public official) for services performed by an employee for his employer ....

* * * *

(d) Employer.

For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that --

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" (except for purposes of subsection (a)) means the person having control of the payment of such wages ....

§ 3402. Income collected at source.

(a) Requirement of withholding.

(1) In general. Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary.

* * * *

26 U.S.C. §§ 3401-3402.

Chapter 75 of the Internal Revenue Code ("Crimes, Other Offenses and Forfeitures") provides, in part:

§ 7202. Willful failure to collect or pay over tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined ..., or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7202.

As used in § 7202 and related statutes, the term "person" is defined as follows:

> § 7343. Definition of the term "person"
>
> The term "person" as used in this chapter includes an officer or employee or a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C. § 7343.

STATEMENT OF THE CASE

Following an initial mistrial due to a hung jury, petitioner was convicted at a retrial of willful failure to file personal income tax returns for four years, of willfully failing to withhold and pay over employment taxes on employees of a business he owned and controlled, and of making false claims against the United States by seeking refunds of past taxes his business had paid. His efforts at the retrial to present a defense of good faith belief in the legality of his actions were severely hampered. The court of appeals affirmed both the judgments of conviction and the resulting upward departure sentence, which expressly doubled the recommended guideline range based on petitioner's political statements, associations and beliefs.

a. *Procedural History*

A grand jury sitting in the Northern District of Texas returned an indictment in June 2003 charging petitioner Simkanin with 12 counts of willful failure to collect, account for and pay over employment taxes imposed under Subtitle C of the Internal Revenue Code, in violation of 26 U.S.C. § 7202, and 14 counts of false claims against the United States by filing various amended IRS Forms 941 and 940-EZ, in violation of 18 U.S.C. § 287. An initial trial in November 2003, at which the court instructed on "good faith" as explained by this Court in *Cheek v. United States*, 498 U.S. 192 (1991), ended in a hung jury.

On December 17, 2003, a second superseding indictment added four counts of willful failure to file personal income tax returns for the years 1998 through 2001, in violation of 26 U.S.C. § 7203. The remaining counts reiterated the twelve under § 7202 of failure to withhold taxes from the employees of Arrow Custom Plastics, Inc., on a quarterly basis, from March 2000 through December 2002, and 15 counts under 18 U.S.C. § 287 of filing false claims in January 2000 for refunds of amounts previously withheld and paid over by Arrow. CA5 RE 3.

The second trial was held in early January 2004. In its instructions for the retrial, the court advised the jury that Arrow Custom Plastics had a legal duty in 2000-2002 to collect, by withholding from the wages of its employees, the employee's share of social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay over the withheld amounts to the United States. CA5 RE 10, at 252. At the same time, it instructed the jury to determine whether Arrow was an employer that paid wages. *Id.* 254. The court did not charge on good faith. *Id.* 259-60. During deliberations, the jury requested clarification with respect to the issue of willfulness, CA5 RE

12, at 2-5, and on whether Arrow was an employer. *Id.* 9-10. On the latter occasion, Judge McBryde expressly directed the jury, over objection, that Arrow was an employer obligated to withhold. *Id.* 11-14.

The jury eventually hung on counts 1 and 2 (willful failure to file and pay over employment taxes in March and June 2000) but found petitioner guilty on counts 3 through 31 of the second superseding indictment.

On April 30, 2004, Judge McBryde sentenced petitioner Simkanin to serve a total of seven years' imprisonment, based on a substantial upward departure from the U.S. Sentencing Guideline term. CA5 RE 14, at 77-80. The court also ordered petitioner to pay $302,076.33 to the IRS as restitution. *Id.* 80-81.

Following the entry of judgment, petitioner appealed to the Fifth Circuit. The panel held that the trial court had not improperly answered a question from the deliberating jury by instructing that the court had found true a fact that was for the jury to decide. The court of appeals concluded there was no reasonable likelihood that the jury would understand the trial judge's instruction to mean what it said in that regard. Appx. A19, 420 F.3d at 408. Alternatively, the court found the instruction, if erroneous, to be harmless beyond a reasonable doubt. Appx. A20, 420 F.3d at 408. The court below further concluded that it was unnecessary for the trial court to instruct on "good faith" under *Cheek*, because a correct instruction had been delivered defining "willfulness." Appx. A22-27, 420 F.3d at 410-12. Finally, the court of appeals found no abuse of discretion in the imposition of a sentence substantially above the Guidelines range, even though that sentence was expressly predicated on petitioner's political beliefs and associations. Appx. A38-43, 420 F.3d at 417-19. The court *en banc* refused to rehear the case. Appx. B.

This petition follows. Petitioner Simkanin has been incarcerated since his arrest on June 20, 2003. He is presently serving his sentence in the Federal Correctional Institution at Texarkana, Texas.

b. ***Statement of Facts***

Petitioner Richard Simkanin owned Simkanin, Inc., d/b/a Arrow Custom Plastics; until 1997, he was also Arrow's President. At that time, he made his sister-in-law president, although he continued to exercise authority over the company. In December 1999, petitioner decided that Arrow would not withhold taxes from its employees' wages. Arrow made quarterly filings concerning withholding from employees' pay through the end of 1999, but none from March 2000 through September 2003.

In January 2000, petitioner submitted 15 claims on behalf of Arrow Custom Plastics for refund of employment taxes paid over from 1997-1999. The IRS concluded that the claims "had no merit." A government witness testified that petitioner had "a library of material" pertaining to withholding, and that in the witness's opinion petitioner thought his position was actually a correct understanding of the law, and that the defendant was not "just trying to get out of paying taxes."

Petitioner engaged in extensive correspondence with the IRS regarding the status of his workers. The IRS witness testified that the workers were, in "our opinion," employees. Inquiry into the basis for the witness's legal conclusion was precluded by the trial judge as either beyond the scope of direct or because the definition of an employee under the IRC was not to be developed.

Arrow's former accountant testified that he prepared and filed corporate income tax returns beginning in 1994. He also prepared and filed individual returns for petitioner and his wife in 1993, 1994, and 1995. He filed no returns

for 1996 and 1997 for them, because petitioner said he had no taxable income in those years. Petitioner said he was relying on information that supported his position, giving his accountant copies of those documents.

The accountant's employer, a CPA, gave a legal opinion that petitioner, "as the owner of Arrow Custom Plastics," was the responsible party to collect taxes on Arrow's employees' taxable income. He said that in March 2000 he discussed Arrow's failure to withhold and remit employment taxes with petitioner. Simkanin expressed the opinion that the Internal Revenue Code did not apply to him, basing that view on his own studies.

The IRS case agent testified that based upon the amounts of gross income that petitioner stipulated for 1998 thrugh 2001, he was legally required to file individual income tax returns for each of those years.

Petitioner took the stand in his own defense. He attempted to tell the jury about his research into the tax law, including particular Supreme Court cases on which he said he relied. He also testified that he relied on advice from an accountant with whom he talked in 1997 or 1998 after hearing her speak as a guest on a radio talk show.

Explaining his exclusion from evidence of exhibits upon which petitioner testified he had relied in reaching his conclusions about tax liability, Judge McBryde stated he had "made some mistakes" during the first trial that it was "going to try not to make them again." Petitioner testified that the Internal Revenue Code is some 7000 pages in length; one reason it is so lengthy, he said, is that "it names a lot of industry and activity that is taxable." If Arrow Custom Plastics were engaged in any of those industries, petitioner testified, he would pay the income and/or

employment taxes required.[1] Petitioner also testified that after consulting the applicable Treasury Regulations, he concluded that "the employees at Arrow Plastics" did not fit the definition of "employee" for withholding purposes. The district court prohibited petitioner from "using or making reference to the text of the Internal Revenue Code" to back up these statements.

The defense called several witnesses, including a former IRS agent and a California attorney. Based on conversations with petitioner during the pertinent time frame, these witnesses agreed that petitioner had specific statutory grounds for his opinions about his tax obligations.

Robert Schulz, founder of the We the People Foundation for Constitutional Education, also testified that he spoke with petitioner several times between July and November 1999, directed him to the Foundation's website, and advised him that he had a right under the Petition Clause of the First Amendment to ask questions of the government and to expect answers. Schulz testified he had advised petitioner that the Foundation's research supported the conclusion that "there is no law that requires most Americans to file and pay an income tax, or most companies to withhold an income tax from the paychecks of the men and women working for them." Petitioner's name and likeness had been used in a full-page *USA Today* ad, sponsored by We the People, proclaiming his opinions and conclusions regarding the income tax.

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[1] Had the prosecutor cross-examined petitioner on his underlying factual assertions, it would have supported the *Cheek* defense by showing that petitioner's position was based, at least in part, on mistaken beliefs about both the length and content of the Code. Allowing this testimony to stand unchallenged led to jury confusion, as discussed below.

c. *Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)* The United States District Court for the Northern District of Texas had subject matter jurisdiction of this case under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. This Court should either overrule its 1999 decision in *Neder v. United States*, or else distinguish it and reaffirm the 1983 plurality decision in *Johnson v. Connecticut* that prejudice is presumed from an instruction which takes an unstipulated factual question away from the jury.

The court below upheld petitioner's convictions for failure to withhold income and employment taxes and for filing "false" refund claims for such taxes, previously paid. It was "a fact necessary to constitute the crime" in each of those counts, if not an element of each offense,[2] that petitioner's company, Arrow Plastics, had a duty under the Internal Revenue Code to withhold such taxes (and that petitioner was someone who could be held criminally responsible for any failure of Arrow to do so). Yet the trial court instructed, in response to a question during deliberations about whether the jury needed to peruse "those 7,000 [pages]" to determine whether Arrow had to withhold:

> The Court has made the legal determination that within the meaning of Title 26, United States Code, Section 7202, during the years 1997,

[2] See *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), quoting *In re Winship*, 397 U.S. 358, 364 (1970).

> 1998, 1999, 2000, 2001, and 2002, Arrow Custom Plastics, through its responsible officials, had a legal duty to collect by withholding from the wages of its employees, the employees' share of social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay the withheld amounts to the United States of America. You are to follow that legal instruction without being concerned whether there are certain employers who are not required to collect and withhold taxes from the wages of their employees.
>
> Of course, you will bear in mind in your deliberations all other instructions the Court has given you concerning the law applicable to this case.

R.E. 12, at 14.[3] Defense counsel objected to this response on the ground, *inter alia*, that "it amounts to an instructed verdict of guilty by instructing them on that point[,] since that is the disputed issue and the basis for his defense." The defense objections were overruled. Shortly thereafter, the jury returned verdicts of guilty on counts 3 through 31, and reported they were hung as to counts 1 and 2. Several interrelated questions warranting this Court's review are implicated.

The challenged instruction directed a verdict as to the first part of an essential element the government had to prove; *i.e.*, as stated in the court's charge, "First: That Arrow Custom Plastics was an employer that paid wages to its employees." The instruction unequivocally told the jury that Arrow Custom Plastics was, as a matter of fact, an "employer," for only "employers" have a duty to withhold

[3] Some of this language had been included in the trial court's initial instructions, without objection from the defense.

from the wages of an employee. *See* 26 U.S.C. §§ 3111(a), (b), 3301, 3401(a)(1).[4] The jury then had nothing to decide but whether Arrow's employees were paid wages.[5] The Fifth Circuit opinion pointed out that the trial court's instructions also twice required the jury to make a determination whether Arrow paid wages, and that the jury had been advised to remember the rest of the instructions. Thus, the court reasoned, "there was not a reasonable likelihood that the jury applied the instruction as if it were a directed verdict on that element of the offense." Appx. A19, 420 F.3d at 408. Yet as the court below conceded, "This reading of the court's response" is "plausible in a literal sense." Appx. A17; 420 F.3d at 407. That rationale is not consistent with this Court's controlling decisions.

Surely, there is at least "'a reasonable likelihood that the jury has applied the challenged instruction in a way' that" is unconstitutional, that is, as they were told to. See *Estelle v. McGuire*, 502 U.S. 62, 72 (1991), quoting *Boyde v. California*, 494 U.S. 370, 380 (1990). An appellate court is therefore bound to assume that the jury so understood it, rather than the opposite. See also *Victor v. Nebraska*, 511 U.S. 1, 6 (1994); *Francis v. Franklin*, 471 U.S. 307, 322 (1985). After all, a "jury is presumed to follow its instructions," *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), not to set them aside as contrary to some other principle. "A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Franklin*, *id.*

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[4] These provisions are reproduced in excerpted form in the Statutes Involved *ante*, and in full in Appendix C.

[5] By statutory definition, one becomes an "employer" only by having "employees" working for him. *See* 26 U.S.C. §§ 3401(c)-(d).

Invoking the maxim that the jury instructions must be considered as a whole, *see* Appx. A17, 420 F.3d at 407, does not avoid the error here. "Language that merely contradicts and does not explain ... will not suffice to absolve the infirmity." *Franklin*, 471 U.S. at 322. This is particularly so where the erroneous language was repeated in response to a jury question, and the error was reinforced with new, mistaken wording. *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). The trial court may have *intended* by its supplemental instruction to explain the law of withholding to the jury, and to remind the jury that ascertaining the law was for the court not the jury to resolve, while applying the law to the facts, after finding those facts, was for the jury. The import of its words, on the other hand, was instead to tell the jury that Arrow's relationship to its workers during the years charged in the indictment was in fact that of "employer" and "employee" within the meaning of the federal tax laws.

The court below also deviated from this Court's precedent in ruling that the fundamental error in this case was, in any event, harmless. In petitioner's case, the defendant testified (as best he could, given all the restrictions Judge McBryde imposed) that after diligent study he did not believe (or at least had not believed, during the time periods charged in the indictment) that Arrow Custom Plastics was a "employer" under § 3402. It was up to a properly instructed jury, then, to decide, beyond a reasonable doubt, *inter alia*, (a) whether Arrow was in fact an "employer" under the tax law, and, if it was, (b) whether Simkanin actually knew this during the time in question and did not sincerely profess otherwise. Yet the trial judge told the jury he had made this determination himself "within the meaning of Title 26, United States Code, Section 7202," the criminal statute under which the jury

knew petitioner was charged (in other words, not simply under the tax-imposing statute, *id.* § 3402), and that Arrow's status as "employer" obtained "during the years 1997, 1998, 1999, 2000, 2001, and 2002," which of course were the charged years.[6] It is uncontested that the trial court has no authority to make any such determination, regardless of the nature of the element or the state of the evidence. *United States v. Gaudin*, 515 U.S. 506 (1995). Even if a rule of harmless error could apply, the error in this case could not be treated as harmless.

In the court below, the government eventually conceded that if a harmless error rule applies to such an instruction, it is the government that bears the burden (as petitioner had stated from the beginning) to establish the trial court's error was "harmless beyond a reasonable doubt." Post-Arg. Ltr.Br. 3. If such an instruction can be harmless constitutional error, the government did not meet its burden in this case. The evidence on the subject consisted solely of an unexplained, conclusory "opinion" of an IRS employee, stated as such. For example, the government offered no evidence to allow a jury determination under "the usual common law rules applicable in deter-

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[6] In the present case, it must be recalled, although petitioner was prosecuted under 26 U.S.C. § 7202 for willful failure to withhold and pay over employment taxes, he was *not*, on either side's theory of the case, the "employer" in question. The alleged "employer" was Arrow Custom Plastics, the company which Simkanin owned (a status which would not make him liable for Arrow's employment tax obligations) and (according to the government's evidence) controlled (a fact which could make him liable; *id.* §§ 3401(d)(1), 7343). Yet the district court did not instruct the jury on the criteria made pertinent by the latter two statutes.

mining the employer-employee relationship," 26 U.S.C. § 3121(d)(2), nor did the trial court instruct the jury on those rules. Instead, the court below dismissed the error as harmless because the defendant "did not, and apparently could not, bring forth facts contesting" the government's position, Appx. A21, 470 F.3d at 409, quoting from *Neder v. United States*, 527 U.S. 1, 18-19 (1999). The court of appeals thus shifted the burden impermissibly.[7]

As this Court's majority explained in *Neder*, that decision concerns a "narrow class of cases" where the trial court omits, over objection, to charge the jury on one element of the offense, which the court has instead decided for itself. 527 U.S. at 17 n.2 (discussing *Rose v. Clark*, 478 U.S. 570, 578 (1986)). The Court declared such cases distinguishable from those in which the court directs a verdict of guilty. See *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395, 408 (1947) (treating as equivalent to directed verdict the court's omission, as in this case, of any explanation for the jury of the statutory criteria for the defendant to be held vicariously liable).

[7] The court of appeals also overlooked a separate manner in which the trial court's instructional error was prejudicial. A minimally sufficient explanation of the legal rules governing the definition of "employer" and "employee" in this setting -- rules which are not even the same among the five different taxes involved (income withholding tax, IRC § 3402; Social Security, IRC § 3101(a); Medicare, IRC § 3101(b); and the employer's Social Security and Medicare excise taxes, IRC §§ 3111(a),(b)) -- would have revealed their complexity, and thus have supported the plausibility of petitioner's "good faith" misunderstanding defense under *Cheek*. *See* Appx. C (to reprint just the text of the statutes involved consumes some 89 pages).

In *Neder*-type cases, the Court permits an appellate tribunal to find the omission of an element harmless beyond a reasonable doubt if the element "is supported by uncontroverted evidence ...." 527 U.S. at 18. Only "where the defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* 19. The court below did not demonstrate that the instant case comes within that narrow category. Instead, it focused on petitioner's principal legal defense (lack of willfulness), Appx. A14-15, 420 F.3d at 406, even though the employer status issue was never stipulated and was treated as contested.

The starting point must be what evidence *the government* brought forth on the element. The decision of the court below disregards that at trial the government placed in evidence exhibits numbered 136 through 147. Its witness, a "tax compliance officer" with the IRS, testified that these exhibits constituted correspondence between the IRS and petitioner regarding the status of workers as either employees or independent contractors.[8] On cross-examination the IRS witness testified that the workers were, in "our opinion," employees. No explanation was allowed.[9] In addition to petitioner's own testimony, this is the totality of the relevant evidence on the subject.

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[8] Since the letters from Simkanin were introduced by the government, they constituted "admissions" under Fed.R.Evid. 801(d)(2)(A) which the jury could take for their truth.

[9] Had defense counsel not cross-examined on this point, there would actually have been *no* evidence in support of this fact essential to proof of the government's case.

A reasonable jury could have found the IRS's answers to petitioner's concerns, as expressed in Exhibits 136-147, to be unsatisfying. Similarly, the jury could easily have been unpersuaded by the unexplained expression of a conclusory "opinion" on the subject. The jury's doubt on this score may then have been reinforced by petitioner's sincere demeanor while testifying.[10] The jury could thus readily have entertained a reasonable doubt on the "employer" element, given the weakness of the government's case on the issue. The jury's note shows that at least some jurors had questions whether the withholding obligation was inapplicable to some "employers" of some "employees" (as, indeed, it is; *see* Appx. C (setting forth pertinent statutes at length)), and thus whether Arrow had been proven to be subject to a legal duty under that law. Thus, the instant case does not come within the "narrow class" in which such error as Judge McBryde committed at this trial could be found harmless beyond a reasonable doubt, and the government's letter brief does not demonstrate otherwise.

Whether error which deprives a defendant of his Sixth Amendment right to trial by jury on a fact which is essential to the punishment (whether or not that fact is labeled an "element" of the offense) should be presumed to be prejudicial, or whether the government can be allowed to establish harmlessness, has often divided this Court by the narrowest of margins. See *Connecticut v. Johnson*, 460

[10] That the jury used the word "employees" on its note seeking further instructions (like petitioner's own use of the same term in his testimony), Appx. A18, 420 F.3d at 408 n.9, does not establish that the jury had resolved the issue as a legal matter, but rather shows only that the word is commonly used in a non-technical sense to mean "workers."

U.S. 73, 83-88 (1983) (plurality opinion).[11] *Neder* was decided by a 5-1-3 vote. The dissenting opinion viewed the decision as a major constitutional error. *Neder*, 527 U.S. at 30-40 (Scalia, J., with Souter & Ginsberg, JJ., dissenting); see also *id.* 28-29 (Stevens, J., concurring). Arguably, the *Neder* dissenters' view of the Sixth Amendment jury trial right has since prevailed. See *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 769 (2005) (shifting majority of five suggests no more than that in cases "*not* involving a Sixth Amendment violation," whether relief is required on appeal "may depend upon application of the harmless error doctrine"); see generally *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). The time has come for the Court to confront the issue squarely.

The decision of the court below raises this grave constitutional question (which "operat[es] upon the spinal column of American democracy," *Neder*, 527 U.S. at 30 (dissent)), by the manner in which it applied the harmless error doctrine. The Court should grant certiorari to determine whether that rule was applied too loosely. Alternately, this Court should grant certiorari to consider overruling the decision in *Neder* and holding that a jury instruction purporting to determine a question of fact which is essential to conviction must be presumed prejudicial, requiring automatic reversal.

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[11] *Johnson* lacked a fifth vote for a structural error approach to the problem only because Justice Stevens, concurring, found the harmless error question not properly presented on certiorari to the supreme court of a state, when that court had not employed a lower standard.

2. The Circuits are divided on the question whether a minimal but correct jury charge on willfulness is sufficient to protect a tax defendant's right to an instruction supporting a "good faith" defense under this Court's decision in *Cheek*.

The petitioner's principal defense at trial was "good faith" under this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991). At the first trial, the court delivered a jury charge explaining good faith; the jury hung. Instead of charging under *Cheek* at the retrial, however, the trial court delivered, over objection, only a two-sentence statement on willfulness, as defined by this Court in *United States v. Bishop*, 412 U.S. 346, 360 (1973), and *United States v. Pomponio*, 429 U.S. 10 (1976) (per curiam): "To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." *See* Appx. A21, 420 F.3d at 409 (quoting instruction). The Fifth Circuit found this charge sufficient to avoid reversal, because "willfulness" as defined in tax cases is logically inconsistent with "good faith." *Id.* 410-11. In at least two other Circuits, the refusal of this instruction would be reversible error. See *United States v. Morris*, 20 F.3d 1111, 1114-18 (11th Cir. 1994); *United States v. Regan*, 937 F.2d 823, 826-27, *as amended*, 946 F.2d 188 (2d Cir. 1991). Certiorari should be granted to resolve this split among the courts of appeals.

In *Cheek*, the Court held that "willfulness," as long defined for purposes of criminal tax cases, depends on the defendants' actual beliefs regarding their statutory obligations, without regard to whether those beliefs are "reasonable." Such beliefs were consistently discussed in terms of "good faith." 498 U.S. at 201-02. As this Court has long noted in similar contexts, "Without the knowledge, the intent cannot exist." *Direct Sales Co. v. United States*, 319

U.S. 703, 711 (1943); accord, *Anderson v. United States*, 417 U.S. 211, 224 (1974). As the Court pointed out in *Cheek*, 498 U.S. at 200, the holding of *United States v. Murdock*, 290 U.S. 389, 396 (1933), was that the defendant in a federal tax case, upon request, is entitled to an instruction on "good faith" belief. Yet, as the Court further acknowledged, the holding of the *per curiam* in *Pomponio*, 429 U.S. at 13, some four decades later, is stated as follows, "The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary." (quoted in *Cheek*, 498 U.S. at 201). The latter holding was misconstrued by the court below to mandate affirmance.

The willfulness charge in this case recited the minimally mandated words of *Pomponio*, and identified *what* the defendant had to "know," but completely failed to elaborate or explain the rule, as required by the decisions in *Murdock* and *Cheek*. A jury would have to listen very carefully (and have an outstanding memory, as it was denied a written copy of the charge) to find in the one sentence quoted from *Pomponio* the tripartite requirement of *Cheek*, much less the point emphasized there that the defendant's belief, if genuine, need not be found to be reasonable.

Indeed, its seems the jury did not understand. After less than 90 minutes of deliberation, the jury issued a note asking "what is the definition of "willful?"" The court's response again did not include a good faith defense instruction. It is simply unrealistic to suggest, as does the court below, that petitioner's request for a good faith instruction was "substantially covered." Appx. A25, 420 F.2d at 411.[12] If it were actually obvious that *Cheek* follows from

[12] On the second day of jury deliberations, the defense filed a motion for reconsideration and request for (1) the pattern

a mere recitation of the *Bishop/Pomponio* test, then the split in the Circuits which led this Court to grant certiorari and decide the *Cheek* case itself would never have developed. Rather, the jury charge in this case represents a wholesale rejection of the entire idea of elaborating on "willfulness" in the *Cheek* sense. Where, as here, the defendant's requested instruction, *see* CA5 RE 11, was substantially correct, reversal should have resulted.

The court below misleadingly discusses *Pomponio* as if it stood itself for the proposition that a correct "willfulness" charge substitutes for an instruction on good faith in the sense requested by petitioner at trial. Appx. A24-25, 420 F.3d at 411. But if that were so, *Pomponio* would have overruled *Murdock*, while the *per curiam* opinion contains no such suggestion. In fact, all that *Pomponio* held is that a charge requiring "bad purpose" or "evil motive" for conviction, as had been sought by the defendant in that case, was unwarranted. The reference to "good faith" in *Pomponio* was simply shorthand for the erroneous request that the defendant had made there; it is no authority for what occurred here. To refuse a charge on "good faith" in petitioner's case was to refuse to instruct on the defense theory with respect to the key contested element of the charged offenses. The court below thus affirmed the violation of another fundamental of a fair trial, as guaranteed by this Court. See *United States v. Mathews*, 485 U.S. 58, 63 (1988) (right to an instruction on theory of defense, whenever supported by some evidence).

The government did not demonstrate (nor did the court below find) that the denial of a "good faith" instruc-

_____(cont'd)
jury instruction regarding mistake, ignorance, negligence or gross negligence and (2) a good faith instruction under *Cheek*. This was again denied.

tion in this case was or could have been harmless error. Most of the defendant's corroborating evidence was excluded, and his own testimony and that of his witnesses was substantially limited.[13] Worse, the trial court placed counsel under a strict 15-minute limit for closing argument.[14] In the transcript, the defense closing occupies less than eight pages. During this period it was hardly possible even to marshal the main evidence adduced from 14 witnesses and numerous documents, much less to fully argue the inference of good faith or elaborate the meaning of reasonable doubt concerning willfulness, as applied to three different types of statutory offenses. Thus, this is not a case where a generous approach to the defendant's testimony and witnesses or to counsel's argument might excuse the refusal to charge on the defense theory of good faith.

Because seemingly conflicting language in this Court's *Murdock* and *Pomponio* decisions has led to a split in the Circuits over the defendant's right to a "good faith" instruction under *Cheek*, and because the trial court's jury charge, read as a whole, denied essential support to petitioner's legitimate theory of defense, certiorari should be granted.

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[13] As the judge explained, he had "made some mistakes" during the first trial, which resulted in a hung jury, and was "going to try not to make them again."

[14] Defense counsel's request for just three minutes more was denied with a facetious remark. Judge McBryde then rigidly policed the 15-minute limit at trial, including interruptions to announce the elapsed time.

3. The Court should consider whether the First Amendment permits a sentence to be substantially increased on the theory that a defendant's deeply held anti-government political views create a risk of recidivism equivalent to that of a career criminal.

Over a four-year period, petitioner Simkanin failed to file federal tax returns. This conduct arose out of his prominent involvement with groups and individuals espousing unconventional opinions about the U.S. tax system. Petitioner had no criminal record. Yet the district court imposed an upward "departure," 18 U.S.C. § 3553(b), to equate his sentence with that of a defendant in the least favorable "criminal history category" under the U.S. Sentencing Guidelines, *see* USSG § 4A1.3 (p.s.), and imposed a term of seven years' imprisonment. The judge expressly predicated this doubling of the sentence on "the defendant's radical beliefs relative to the laws of the United States." Petitioner argued on appeal that the severity of the sentence violated his First Amendment rights. The Fifth Circuit's rejection of his claim warrants this Court's review.

The court below concluded that:

> Simkanin's specific beliefs that the tax laws are invalid and do not require him to withhold taxes or file returns (and his association with an organization that endorses the view that free persons are not required to pay income taxes on their wages) are directly related to the crimes in question and demonstrate a likelihood of recidivism. Thus, the district court did not constitutionally err in considering these factors.

Simkanin, 420 F.3d at 417-18. This Court should address the important question whether a bare showing of relevance of a person's political associations

(as support) and beliefs (as a motive) for the crime of conviction is sufficient under the Constitution to justify a doubling of his sentence.

The district court's inference that petitioner had "immersed" himself in a "movement" that the court likened to a "cult" does not make an increased sentence permissible, much less necessary. *See* 18 U.S.C. § 3553(a) (any federal sentence must be "no greater than necessary" to achieve lawful objectives of criminal justice). The court below does not even attempt to justify treating petitioner's "association with an organization" as a constitutionally allowable sentencing factor. The opinion of the Fifth Circuit throws to the winds the careful analysis in this sensitive area endorsed by this Court in *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) and *Dawson v. Delaware*, 503 U.S. 159 (1992). Under the First Amendment, an intent to commit future crimes cannot be inferred from bare association or membership. See *Elfbrandt v. Russell*, 384 U.S. 11, 15-16 (1966); *Scales v. United States*, 367 U.S. 203, 229-30 (1961).

Where the defendant's conduct involves a mixture of alleged crime and protected First Amendment activity, a court must review questions of intent "strictissimi juris" (by the strictest standard known to the law). *Noto v. United States*, 367 U.S. 290, 299-300 (1961). The idea that unprotected conduct, when interconnected with First Amendment activity, requires a highly cautious approach is pervasive in this Court's cases. See *McDonald v. Smith*, 472 U.S. 479 (1985) (malice and absence of good faith necessary to destroy First Amendment privilege with respect to defamatory letter sent to public official); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (strict construction

of "threat" required in political context, to avoid First Amendment issues). Under our Constitution, a person's opinions, including "radical beliefs" in opposition to government authority, simply cannot justify increased criminal punishment. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The court below attempts to distinguish all these cases on purely factual grounds, Appx. A40, 420 F.3d at 418 n.23, and does not apply the governing principles for which they stand.

The First Amendment "strictissimi juris" doctrine, as announced and applied by this Court in *Noto*, 367 U.S. at 299-300, has been followed in several circuits as a tool for evaluating the sufficiency of the evidence, not limited to cases where membership is itself the charged offense, as in the Smith Act cases. See *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972); accord, *United States v. Dodge*, 538 F.2d 770, 780 n.16 (8th Cir. 1976); *United States v. Spock*, 416 F.2d 165, 172 (1st Cir. 1969).[15] The courts below improperly gave short shrift to the application of that fundamental doctrine at sentencing.

As this Court has put it, "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." *Mitchell*, 508 U.S. at 485 (explaining *Dawson*).[16]

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[15] The doctrine is a pervasive one under the First Amendment, and can even require strict caution in applying the ordinary rules in civil cases. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982) (discussing and applying doctrine to invalidate award of damages against organization for losses arising out of boycott led by group).

[16] This constitutional rule necessarily operates as an exception to 18 U.S.C. § 3661, which states, "No limitation shall be

There is simply no denying that in this case, petitioner's "abstract beliefs" were "taken into consideration." Indeed, "beliefs" were explicitly made the centerpiece of Judge McBryde's rationale for increasing petitioner's sentence.

Petitioner Simkanin is a stable, 60-year-old businessman and engineer. The offenses for which he was convicted are nonviolent property offenses against the government. They were committed openly, even defiantly, and were thus easy to detect and relatively easy to prove. It was unreasonable for the court below to conclude that petitioner's risk of recidivism -- on account of his deeply held political beliefs, as the district court viewed and interpreted them -- was equivalent to that of a career criminal, or of a defendant with more than four prior felony sentences of imprisonment (the typical Category VI offender).[17]

The district court's analysis that the lawful purposes of sentencing demanded at least seven years' imprisonment, and that petitioner would not be deterred or reformed by less had no lawful basis. The inflation of petitioner's criminal history category more

_____(cont'd)
placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

[17] The court below also found no "plain error" under *United States v. Booker*, 543 U.S. 220 (2005). Appx. A43-44, 420 F.3d at 419-20. While the circuits are split on the proper application of that doctrine to pre-*Booker* sentencings, petitioner does not present this as a separate basis for certiorari in his case.

than doubled his sentence, adding three years or more of imprisonment, based expressly upon his disfavored expression of dissident political opinion.

As Judge Farris wrote, while dissenting from the Ninth Circuit's reversal of two tax convictions:

> Unfortunately, these defendants have been labeled by some as "tax protesters." That label has no use in a court of law. America was built by "protesters." Their input should always be considered.

United States v. Wadsworth, 830 F.2d 1500, 1511 (9th Cir. 1987) (dissenting opinion). That view is more consonant with Congressional command[18] and the Constitution than was the district court's justification for doubling petitioner's punishment, as endorsed by the court below. To define and enforce the First Amendment limitations on sentencing enhancement, the writ of certiorari should be granted to review the decision of the Fifth Circuit below.

CONCLUSION

For the foregoing reasons, petitioner RICHARD SIMKANIN prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

By: PETER GOLDBERGER
Attorney for Petitioner

January 25, 2006.

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[18] Part of the Internal Revenue Service Restructuring and Reform Act of 1998 prohibits the "officers and employees of the Internal Revenue Service" from "designat[ing] taxpayers as illegal tax protesters (or any similar designation) ...." Pub.L. 105-206, § 3707(a), 105th Cong., 2d Sess., 112 Stat. 685 ("Taxpayer Bill of Rights III").

APPENDIX A

420 F.3d 397, 96 A.F.T.R.2d 2005-5577,
2005-2 USTC ¶ 50,507

United States Court of Appeals,
Fifth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Richard Michael SIMKANIN, Defendant-Appellant.
No. 04-10531.

Aug. 5, 2005.

***399** Alan L. Hechtkopf, Samuel Robert Lyons (argued), U.S. Dept. of Justice, Washington, DC, for U.S.

Peter Goldberger (argued), Law Office of Peter Goldberger, Admore, PA, Robert G. Bernhoft, The Law Office of Robert G. Bernhoft, Milwaukee, WI, for Simkanin.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL*, District Judge.

KING, Chief Judge:

Defendant-Appellant Richard Michael Simkanin appeals his conviction for ten counts of willfully failing to collect and pay over employment taxes in violation of 18 U.S.C. § 7202, fifteen counts of

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* District Judge of the Southern District of Texas, sitting by designation.

knowingly making and presenting false claims for refund of employment taxes in violation of 18 U.S.C. § § 287 and 2, and four counts of ***400** failing to file federal income tax returns in violation of 26 U.S.C. § 7203. He also appeals his sentence of eighty-four months imprisonment. For the following reasons, we AFFIRM Simkanin's conviction and sentence.

I. BACKGROUND

Defendant-Appellant Richard Simkanin owned Arrow Custom Plastics, Inc. ("Arrow") since its incorporation in 1982. In 1993, Simkanin met with an accountant, Jim Kelly, who advised him that he would need to change Arrow's accounting method and that this change would result in an increase in Arrow's corporate income tax. Simkanin thereafter began to question the federal tax system's applicability to him and its validity in general. On his 1994 and 1995 individual income tax returns, he made notations (i.e., "UCC 1-207") apparently in an attempt to indicate that the returns were filed under protest. He did not file individual tax returns for the years 1996-2001.

With respect to the 1996 and 1997 returns, Simkanin told Kelly that he was not required to file returns because he did not receive any income but rather lived entirely off of his savings. However, this statement was false--Simkanin did in fact receive a salary from Arrow during these years, and his salary was sufficiently high such that Simkanin owed federal income taxes. On Arrow's books, Simkanin's salary was initially identified as "officer salary" and then later as "remuneration," without any reference to Simkanin being the recipient of the funds. During these years, Simkanin also received payment from Arrow for his personal expenses, which were booked as "repair and maintenance."

In 1996, Simkanin surrendered his Texas

driver's license, and when stopped by the police while driving, he showed a card styled "British West Indies International Motor Vehicle Qualification Card," which he had acquired from a mail order business in Connecticut. He also mailed to the U.S. Treasury Secretary a statement that he had expatriated himself from the United States and repatriated to the Republic of Texas. He posted the same statement on Arrow's internet website, where he also vowed to ignore the laws of the United States.

In 1997, Simkanin removed his name from Arrow's checking and credit card accounts, replacing his name with the name of Arrow's bookkeeper Dianne Clemonds. Simkanin told Clemonds that he did not want his name to appear on documents requiring his social security number. Simkanin then listed Clemonds as Arrow's president on various legal documents, although he retained complete de facto responsibility for the company's affairs and continued to make all of the decisions regarding finances and taxes.

By May 1999, Simkanin had become involved with an organization called We The People Foundation for Constitutional Education ("WTP"), which promotes the view that, despite common misconceptions, there is actually no law that requires most Americans to pay income taxes or most companies to withhold taxes from employees' paychecks. WTP also espouses the view that the Sixteenth Amendment was fraudulently declared to have been ratified. In accordance with these views, Simkanin told accountant Kelly and others that he was not required to pay taxes and that filing returns was purely voluntary. Kelly advised Simkanin that filing returns was not voluntary and that Simkanin could get into trouble if he did not file. Simkanin rejected this advice, and he began to pressure

Arrow's employees to attend seminars sponsored by WTP.

***401** In November 1999, Simkanin told Kelly that Arrow would no longer withhold employment taxes from employees' paychecks. Kelly counseled against this course of action. In response to Simkanin's stated intentions, Clemonds consulted with an attorney. She was advised that she could be personally liable if she went along with Simkanin's plan to stop collecting and paying over taxes. Clemonds therefore resigned from her position at Arrow, and Simkanin returned his name to the Arrow bank accounts as sole signatory. He then stopped Arrow's withholding of federal taxes from the wages paid to its employees.

In January 2000, Simkanin filed with the IRS fifteen claims for tax refunds. He claimed he was owed refunds for taxes paid by Arrow in 1997-99 and also for the taxes collected from, and paid by, Arrow's employees. The IRS denied all of these claims, and Simkanin did not seek further review.

In March 2000, Kelly and Fred Taylor, a named partner in Kelly's accounting firm, went to Simkanin's office to discuss his refusal to withhold and pay federal taxes or file returns. Simkanin reiterated that he had no intention of paying taxes. Taylor advised Simkanin that he could be criminally prosecuted for his actions and, by letter dated March 28, 2000, terminated Simkanin and Arrow as clients.

On March 2, 2001, a full page advertisement by WTP appeared in USA Today. The ad prominently displayed the photographs of five men, including Simkanin. The advertisement stated, inter alia, that Simkanin and the other men pictured had stopped withholding taxes from their workers' paychecks and that they were part of a "growing number of people" who believe that:

1. There is no law that requires workers, as U.S. citizens earning their money from domestic companies, to pay income or employment taxes; nor to have those taxes withheld;

2. The 16th Amendment (the "Income Tax Amendment") was fraudulently declared to be ratified by the Secretary of State in 1913.

The ad concluded with a request for "donations" to WTP.

On March 14, 2001, Simkanin was advised that he was the target of a criminal investigation regarding his failure to file individual income taxes since 1995 and his failure to collect and pay over employment taxes since January 2000. In July 2001, Simkanin was served with a grand jury subpoena that sought the corporate records of "Arrow Custom Plastics, Inc." In response to the subpoena, Simkanin dissolved the corporation and operated Arrow as a sole proprietorship. Despite Simkanin's refusal to produce Arrow's corporate records, the government was able to obtain information about the amount of wages paid to Arrow's employees from the Texas state agency that collected unemployment taxes from Arrow.

On June 19, 2003, an indictment was returned, charging Simkanin with twelve counts of willfully failing to collect and pay over federal income taxes and Federal Insurance Contribution ("FICA") taxes from the total taxable wages of Arrow employees in violation of 26 U.S.C. § 7202,[1] and ***402** fifteen

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[1] Section 7202 provides:

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon

counts of filing false claims for tax refunds in violation of 18 U.S.C. § 287. On August 13, 2003, a superceding indictment was returned, charging Simkanin with the same substantive crimes but stating the applicable law more fully.

On September 3, 2003, the parties filed a plea agreement and a factual resume in which Simkanin pled guilty to four counts of the superceding indictment. However, the plea agreement misstated the maximum penalty to be lower than the actual maximum of five years imprisonment and three years supervised release. The government notified the court that Simkanin had not actually agreed to plead to a count with the maximum penalty of five years incarceration. The court ultimately ordered a deadline for completing a plea agreement, and when the government and Simkanin had not agreed to a new plea agreement by that date, the case went to trial.

Simkanin's first trial began on November 25, 2003. A number of Simkanin's supporters were present outside the courthouse handing out pamphlets on jury nullification. The jury was unable to reach a unanimous verdict, and the district court declared a mistrial. One of the jurors subsequently contacted the court's staff and expressed concern about the behavior of Simkanin's supporters and one of the members of the jury. It was later revealed that some of the jurors had been contacted by Simkanin's supporters.

On December 17, 2003, a second superceding indictment was returned, charging Simkanin with the same offenses in the first superceding indictment plus four additional counts of failure to

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conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

file individual income tax returns. Counts One through Twelve charged Simkanin with willfully failing to collect and pay over federal income taxes and FICA taxes from the total taxable wages of Arrow employees in violation of 26 U.S.C. § 7202 (with each count pertaining to a different tax quarter). Counts Thirteen through Twenty-Seven charged Simkanin with knowingly making and presenting fifteen false claims for the payment of refunds of the employer's share of FICA taxes paid by Arrow and of the employees' share of FICA taxes and income taxes collected from Arrow's employees in violation of 18 U.S.C. § § 287 and 2. Finally, Counts Twenty-Eight through Thirty-One charged Simkanin with failing to file federal income tax returns in violation of 26 U.S.C. § 7203.

The second trial began on January 5, 2004.[2] Simkanin primarily attempted to establish that he did not willfully violate the tax laws because he held a good-faith belief that he was not obligated to pay individual income taxes or to withhold employment taxes from the wages paid to Arrow's employees. Simkanin took the stand and testified that, inter alia, according to his own research: (1) the Constitution provides for two types of taxes--a direct tax and an indirect tax; (2) the income tax is an indirect tax; (3) a man's labor is his own property and cannot be subject to an indirect tax; and (4) the wages that a person receives for his labor are not subject to the income tax. Simkanin further testified that he stopped paying his income taxes and stopped withholding employment taxes from the

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[2] Simkanin's supporters were again outside the courthouse and inside the courtroom. However, security measures were taken to prevent the supporters from contacting members of the jury pool or the selected jurors.

wages of Arrow's employees because he "could not find out what the tax was on."

To support his defense, a number of other witnesses testified that they had informed Simkanin that the federal income *403 tax laws, as written, did not require Simkanin to pay taxes and that the income tax was constitutionally invalid. Joseph Banister, a supporter of WTP, testified that he met Simkanin at a conference entitled "Citizens' Summit to End the Unlawful Operations of the Internal Revenue Service," at which Banister was a speaker. Robert Schultz, founder and CEO of WTP, testified that he advised Simkanin that his research showed that the Sixteenth Amendment had been fraudulently declared to have been ratified and that the constitutional definition of the word "income" is different than the common understanding of income. Larken Rose testified that, through phone conversations with and emails to Simkanin, he explained that the income of the average American is not subject to the federal income tax and that the law merely applies to people engaged in certain types of international trade. Banister, Schultz, and Rose all testified that they did not advise Simkanin to stop withholding taxes or to stop filing tax returns. Eduardo Rivera, an attorney from California, testified that he had consulted with Simkanin in 1999, that Simkanin had paid him over $10,000, and that he told Simkanin that his employees had no legal duty to pay a tax and that Simkanin only had a duty to send money on their behalf to the government if he contracted with them to do so.[3]

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[3] Rivera admitted on cross-examination that in 2003 a permanent injunction had been entered against him, barring him from making such statements.

A government witness, a district director for Congressman Joe Barton, testified that Simkanin had corresponded with Barton's office regarding taxes and the IRS. Barton's office had received, and forwarded to the IRS, letters written by Simkanin expressing his view that he was not required to withhold taxes from his workers' paychecks and that wages are not a source of income subject to federal taxation. The district director testified that Barton's office responded with a letter stating that Simkanin's stated opinions were based on a flawed interpretation of the Internal Revenue Code (the "IRC"), that wages are indeed taxable under federal laws and regulations, and that Simkanin's interpretation had been rejected by the courts.

The jury began its deliberations on January 6, 2004, and on January 7, it returned a verdict of guilty as to Counts Three through Thirty-One. The jury was unable to reach a verdict as to Counts One and Two, and the government moved to dismiss those counts, which the district court did.

At sentencing, the district court applied the 2003 version of the United States Sentencing Guidelines, and it determined Simkanin's criminal history category to be I and his offense level to be Twenty-Two, with a corresponding sentencing range of forty-one to fifty-five months imprisonment. The court decided to depart upwardly from that range, concluding that a range of eighty-four to 105 months more appropriately reflected the likelihood that Simkanin would re-offend. The court then imposed a sentence of eighty-four months. Simkanin appeals both his conviction and his sentence.

II. DISCUSSION

A. The District Court's Response to the Jury Note

[1][2] Simkanin argues that the district court,

when providing a supplemental jury instruction in response to a note from the jury, directed a verdict in favor of the prosecution with respect to one or more essential elements of the offense. We review de novo whether a jury instruction ***404** directed a verdict on an element of the offense. *See* United States v. Bass, 784 F.2d 1282, 1284 (5th Cir.1986). In light of the particular circumstances involved in this case, we conclude that the district court did not direct a verdict for the government on an element of the offense.

In *Cheek v. United States*, 498 U.S. 192, 201-03, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), the Supreme Court defined "willfulness" for prosecutions under the IRC as requiring a "voluntary, intentional violation of a known legal duty." The Court reasoned that because of the complexity of the tax laws, willful criminal tax offenses must be treated as an exception to the general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution. *Id.* Moreover, the Court found that a defendant's good-faith belief that he was not violating the law need not be objectively reasonable to negate willfulness. *Id.* However, the Court distinguished a defense based on the defendant's good-faith belief that he was acting within the law from a defense based on the defendant's views that the tax laws are unconstitutional or otherwise invalid. *Id.* at 204-06, 111 S.Ct. 604. The Court held that the latter belief, regardless of how genuinely held by the defendant, does not negate the willfulness element. Thus, the Court concluded that evidence pertaining to a defendant's beliefs that the tax laws are invalid is irrelevant to establishing a legitimate good-faith defense. *Id.*; *see also* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.38 (West

2001).

The availability of the good-faith defense, while undeniably sound,[4] creates a number of complications and challenges for a district court beyond those arising in the usual criminal trial, in which the defendant's beliefs about what the law requires are not at issue. The defendant in a criminal tax trial, unlike most other defendants, must be permitted to present evidence to show what he purportedly believed the law to be at the time of his allegedly criminal conduct. At the same time, however, the district court must be permitted to prevent the defendant's alleged view of the law from confusing the jury as to the actual state of the law, especially when the defendant has constructed an elaborate, but incorrect, view of the law based on a misinterpretation of numerous IRC provisions taken out of proper context. *See, e.g.*, United States v. Barnett, 945 F.2d 1296, 1300 (5th Cir.1991) (stating that "[t]he jury must know the law as it actually is respecting a taxpayer's duty to file before it can determine the guilt or innocence of the accused for failing to file as required"). The district court in this case, like other courts in similar cases, struggled to balance these two competing concerns when it answered the jury's confusion as to the correct interpretation of the law, which unsurprisingly resulted from Simkanin's testimony about his own erroneous beliefs about the law. Thus, it is with this set of circumstances in mind that we consider Simkanin's arguments on appeal.

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[4] *See, e.g.*, United States v. Burton, 737 F.2d 439, 441 (5th Cir.1984) (noting "the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." (internal quotation marks omitted)).

In its initial instructions, the district court instructed the jury that, in order to convict Simkanin on Counts One through Twelve (willfully failing to collect and pay over federal taxes from the total taxable wages of Arrow employees in violation of 26 U.S.C. § 7202), the jury must find beyond a reasonable doubt that: (1) Arrow was an employer that paid wages to its employees; (2) Simkanin was an official of ***405** Arrow who had responsibility for its decisions regarding the withholding from its employees' wages of Medicare, social security, and federal income taxes, the accounting for such taxes, and the payment of such taxes over to the IRS; (3) Simkanin caused Arrow not to withhold and not to account truthfully for and pay over such taxes; and (4) Simkanin's conduct in causing Arrow not to withhold, account for, and pay over such taxes was willful. The court further instructed the jury that:

> Within the meaning of [26 U.S.C. § 7202], during the years 2000, 2001, and 2002, [Arrow], through its responsible officials, had a legal duty to collect, by withholding from the wages of its employees, the employees' share of social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and to pay withheld amounts to the United States of America.

Simkanin did not object to these instructions at the time they were given.

At trial, Simkanin testified that one reason behind his decision not to withhold taxes from Arrow's employees was his belief that the IRC, which is over 7,000 pages long, contains an extensive (and exclusive) list of industries and activities. Simkanin stated that because Arrow did not operate in any of the listed industries or perform any of the listed activities, he concluded that Arrow's workers were not employees under the IRC and that he therefore

was not required by law to withhold taxes. He further stated that he believed that the definition of an "employee" under the IRC was limited only to persons who worked for a governmental entity including the state or a political subdivision thereof.[5]

During its deliberations, the jury sent a note to the district judge asking the following question:

> Since no proof has been made that the defendant and his employees are in an occupation listed in those 7,000 [pages], are we to conclude that they are, in fact, not in that 7,000, or do we need to read all 7,000 to see what the defendant was referring to, and in fact, wasn't listed in the 7,000[?]

The court responded to the jury's question by stating:

> Now, in answer to your note: You are instructed that you do not need to concern yourself with whether defendant's employees are in an occupation "listed in those 7,000." The Court has made a legal determination that within the meaning of Title 26, United States Code, Section 7202, during the years

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[5] Simkanin's position, as defense counsel concedes, was based on an incorrect view of the law. *See, e.g.*, 26 U.S.C. §§ 3121(a)-(d), 3306(a)-(c), 3401(a)-(d); 26 C.F.R. §§ 31.3121(a)-(d), 31.3306(a)-(c), 31.3401(a)-(d); *Breaux & Daigle, Inc. v. United States*, 900 F.2d 49, 51-53 (5th Cir.1990); *see also Otte v. United States*, 419 U.S. 43, 50-51, 95 S.Ct. 247, 42 L.Ed.2d 212 (1974). This fact is undisputed on appeal, and it is abundantly clear that Simkanin's testimony on his views regarding the definition of an "employer" and "employees" was elicited to support his defense of a good-faith belief, not to show that Arrow was not an employer under the IRC.

> 1997, 1998, 1999, 2000, 2001, and 2002, [Arrow], through its responsible officials, had a legal duty to collect, by withholding from the wages of its employees, the employees' share of the social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay the withheld amounts to the United States of America. You are to follow that legal instruction without being concerned whether there are certain employers who are not required to collect and withhold taxes from the wages of their employees.
>
> ***406** Of course, you will bear in mind in your deliberations all other instructions the Court has given you concerning the law applicable to this case.

Defense counsel objected to the court's response on the ground that, inter alia, the response "amount[ed] to an instructed verdict of guilty by instructing [the jury] on that point since that is the disputed issue and the basis for his defense."[6]

The trial transcript, as well as Simkanin's initial brief, make perfectly clear that the disputed issue at trial was whether Simkanin *willfully* violated the federal tax laws. The basis for his defense was that he did not *willfully* fail to collect and pay over taxes in violation of § 7202 (and that he did not *knowingly* present false claims for refund) because

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[6] We assume, without deciding, that Simkanin's objection to the district court's response to the jury note preserved the alleged error, even though he did not object to the district court's original instruction containing the same language. Thus, we do not review the alleged error under the considerably less defendant-friendly plain-error standard under Fed. R.Crim. P. 52(b).

he believed in good faith that he was not required by law to withhold such taxes.

Simkanin argues on appeal that the district court's response to the jury note constituted a directed verdict on an essential element of the offense, and therefore reversible error, for two reasons. First, Simkanin argues that the court's response erroneously instructed the jury to disregard Simkanin's good-faith defense. Second, he asserts that the court directed a verdict for the prosecution on the first element of the § 7202 offense--that Arrow was an employer that paid wages to its employees. He contends that the district court's error in this regard warrants the vacatur of his conviction as to Counts 3-12 (willful failure to withhold) and Counts 13-27 (false claims of refund for taxes withheld).

As we stated in *United States v. Cantu*, 185 F.3d 298, 305-06 (5th Cir.1999):

> The district court enjoys wide latitude in deciding how to respond to questions from a jury .... Overall, we seek to determine whether the court's answer was reasonably responsive to the jury's questions and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it.

(internal citation and quotation marks omitted). "It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (internal quotation marks omitted).

In arguing that the district court's response directed the jury to disregard his good-faith defense, Simkanin relies on *United States v. Burton*, 737 F.2d 439 (5th Cir.1984), a case involving a defendant's

failure to file income tax returns. In *Burton*, the district court instructed the jury that "[t]he court has ruled as a matter of law that a good faith belief that wages are not income is not a defense to the charges in this case." 737 F.2d at 440. We reversed, holding that a defendant's good-faith belief that the tax laws did not require him to file returns (as opposed to a belief that the tax laws are invalid or unconstitutional) would have negated the willful element of the charged offense and therefore constituted a valid defense.[7] *Id.* ***407** at 441-42. *Burton* is easily distinguishable, however, because unlike the district court in *Burton*, the district court in the present case did not explicitly instruct the jury to disregard the defendant's beliefs about the applicability of the tax laws. Rather, the court instructed the jury that the defendant's purported view of the law--that the fact that the IRC did not list his business activities alleviated him from a legal duty to withhold taxes--was incorrect. Thus, the district court acted properly under the circumstances. *See Barnett*, 945 F.2d at 1300. We see nothing in the district court's instruction that would have led the jury to believe that it must disregard Simkanin's good-faith defense on the willfulness element, especially because the court specifically instructed the jury to keep in mind the other instructions, which included its instruction on willfulness.[8] Thus, the jury remained free to decide

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[7] Similarly, Simkanin cites *Cheek*, 498 U.S. at 192, 111 S.Ct. 604, for the proposition that a district court errs when it instructs a jury to disregard the defendant's evidence of a good-faith misunderstanding of the tax laws.

[8] As we discuss below, the district court adequately instructed the jury on the willfulness element to allow Simkanin to advance his good-faith defense.

the contested issue in the trial, i.e., whether Simkanin's violations of the tax laws were willful as that term was properly defined in the jury instructions.

Second, in a clever reconstruction of the district court's response to the jury note, Simkanin argues that the court's response constituted a directed verdict on another element of the offense, which was uncontested at trial-- namely, the requirement that Arrow was an employer that paid wages to its employees. Counsel contends that, after the court informed the jury of its legal determination that Arrow had a legal duty to withhold, the jury logically could no longer find that Arrow was not an employer that paid wages to its employees--for if the jury found that Arrow was not an employer that paid wages to its employees, then it would mean that Arrow, in effect, did not have a legal duty to withhold taxes. This reading of the court's response, while plausible in a literal sense, is entirely divorced from a reading of the instructions as a whole, as well as from the context in which the jury asked its question and the court responded.

Simkanin relies heavily on this court's decision in *Bass*, 784 F.2d at 1282. In *Bass*, the defendant was charged with willfully submitting false or fraudulent income tax withholding exemption statements to employers in violation of 26 U.S.C. § 7205. 784 F.2d at 1283. The defendant asserted as one of his defenses that he could not be held criminally liable under § 7205 because he was not an "employee" for the purpose of supplying withholding information on a W-4 to his employer. Despite this defense, the district court in *Bass* instructed the jury that "as a matter of law the defendant ... was an employee of" the company in question. *Id.* at 1284. We found this instruction to be constitutionally erroneous because, "by

instructing the jury that Bass was an employee, the district court relieved the prosecution of its duty of proving, beyond a reasonable doubt, Bass's guilt of *every* element of the offense charged." *Id.* at 1284-85.

Unlike in *Bass*, however, the district court in the present case did not explicitly direct a verdict on an essential element of the offense. At most, the court's response, when viewed in isolation, could be interpreted as *implicitly* requiring the jury to find that Arrow was an employer that paid wages to its employees, lest the jury's finding on that element logically conflict with the district court's instruction. However, the district court also expressly instructed the jury at least twice that, in order to convict Simkanin under § 7202, it must determine beyond a reasonable doubt that Arrow was an employer that paid wages to its employees. Furthermore, ***408** when the court answered the jury's question, it reminded the jury to consider all the other instructions that had been given. Thus, when viewed in the context of the entire jury charge, the district court's response merely instructed the jury that Simkanin's belief that he was not required to withhold taxes because Arrow's activities were not listed in the 7,000 pages of the IRC was an incorrect view of the law, and that, if the jury found that Arrow was an employer that paid wages to its employees, Simkanin had a legal duty to withhold despite his professed belief to the contrary.[9] Hence, the district court's answer was reasonably responsive to the jury's question and was a correct statement of the law--it instructed the jury that whether or not Arrow's business activity appears on

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[9] Moreover, it is of no event that the district court used the term "employees" in its response because the jury's own question referred to Arrow's "employees."

a list in the IRC is irrelevant to whether Simkanin had a legal duty to withhold. *See Cantu*, 185 F.3d at 305-06. The original and supplemental instructions as a whole allowed the jury to understand the issue presented to it and required the jury to decide whether the government had proven each essential element beyond a reasonable doubt. *See id.* Accordingly, we conclude that, when the district court's response is viewed in the context of the instructions in their entirety, there was not a reasonable likelihood that the jury applied the instruction as if it were a directed verdict on that element of the offense. *See United States v. Phipps*, 319 F.3d 177, 189-90 (5th Cir.2003) ("The question is ... whether this single misstatement makes the instruction defective as a whole .... [T]he proper inquiry is not whether the instruction could have been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." (internal citation and quotation marks omitted)); *United States v. Musgrave*, 483 F.2d 327, 335 (5th Cir.1973). Accordingly, we find no error in the district court's response to the jury note.

[3] Moreover, even if we were to conclude that the district court's response to the jury note was erroneous, which we do not, we still would not reverse on this ground. In this case, both parties agree that we should affirm if the government proves that the alleged error was harmless beyond a reasonable doubt.[10] *See Neder v. United States*, 527

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[10] Although at oral argument Simkanin's defense counsel argued that the type of error alleged here is not subject to harmless-error review, defense counsel, in supplemental briefing submitted after oral argument, reverted to the position taken in its initial briefs--i.e., that if the district court's response directed

U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Therefore, we would proceed under that assumption, and we would conclude that the government has met its burden to establish that any error here was harmless. In *Bass*, 784 F.2d at 1285, we stated that we could not deem the court's explicit directed verdict on the "employee" element harmless "[b]ecause one of Bass's defenses was that he was not an 'employee[ ]'...." Here, however, one of Simkanin's defenses was not that Arrow was not an employer that paid wages to its employees under the IRC (although one of his defenses was that he did not willfully violate the law because he erroneously believed that Arrow was not an employer that paid wages to its employees under the IRC). During the course of the trial, defense ***409** counsel introduced no evidence that Arrow was not an employer that paid wages to its employees, and defense counsel did not argue or otherwise suggest during the trial that the prosecution had not established this element beyond a reasonable doubt. On appeal, Simkanin does not point to any evidence introduced supporting the notion (or any conceivable basis upon which a rational juror could conclude) that Arrow was not an employer that paid wages to its employees under a legally accurate interpretation of the relevant sections of the IRC. Rather, Simkanin falls back on the argument that it is possible that the jury could have decided that the government's evidence, although uncontradicted, did not establish that element beyond a reasonable doubt. However,

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a verdict on an essential element of the offense, the error is subject to harmless-error analysis and that we may affirm only if the government establishes that the error was harmless beyond a reasonable doubt.

we believe that it would have been irrational for the jury to do so, and Simkanin's argument does not suffice to raise a reasonable doubt in our minds that the jury might have concluded that Arrow was not an employer that paid wages to its employees. This is an instance in which the relevant element was "supported by uncontroverted evidence" and in which the "defendant did not, and apparently could not, bring forth facts contesting the omitted element." *Neder*, 527 U.S. at 18-19, 119 S.Ct. 1827. Accordingly, applying the harmless-error standard agreed upon by the parties, we would find any error here to be harmless beyond a reasonable doubt.

B. Instruction on Good-Faith

Simkanin next argues that the district court erred by refusing to include a specific jury instruction on his good-faith defense. As noted above, the district court's instructions with respect to Counts 1-12 (failure to withhold) stated that the jury must find beyond a reasonable doubt that Simkanin's conduct in causing Arrow not to withhold and not to account truthfully for and pay over such taxes was willful. In elaborating on the meaning of the term "willful," the court instructed the jury that:

> To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. For the government to establish willfulness as to Counts 1-12 of the indictment, it must prove beyond a reasonable doubt as to the count in consideration that defendant knew of the requirements of federal law that [Arrow] collect, by withholding from its employees' wages, Medicare taxes, social security taxes, and federal income taxes, and to account for such taxes and pay them over to the [IRS],

and that he voluntarily and intentionally caused [Arrow] to fail to comply with these requirements.

With respect to Counts 13-27 (false or fraudulent refund claims), the court instructed that the government must prove beyond a reasonable doubt that: (1) Simkanin "knowingly presented to an agency of the United States a false or fraudulent claim against the United States;" (2) Simkanin "knew that the claim was false or fraudulent;" and (3) the false or fraudulent claim was material. The court instructed that "knowingly, as that term has been used in these instructions, means that the act was done voluntarily and intentionally, not because of a mistake or accident."

Finally, with respect to Counts 28-31 (failure to file returns), the court instructed the jury that it must find beyond a reasonable doubt that: (1) Simkanin received gross income in the amounts stated in the indictment for the year in question (this element was satisfied by a stipulation); (2) Simkanin failed to file an income tax return, as required, by the date stated in the indictment; (3) Simkanin knew he was required to file a return; and (4) Simkanin's failure to file was willful. The court then reminded the jury "that to act willfully means to act voluntarily and deliberately ***410** and intending to violate a known legal duty." The court further stated that "[f]or the government to establish willfulness as to Counts 28-31 of the indictment, it must prove beyond a reasonable doubt as to the count under consideration that the defendant knew of the requirement of federal law that he file an income tax return, and that he voluntarily and intentionally failed to do so."

Defense counsel objected to these instructions on the ground that they did not include a specific instruction on good faith under *Cheek*, 498 U.S. at

192, 111 S.Ct. 604. Counsel argued that, for this reason, the district court failed to instruct the jury on the defense's theory of the case. Defense counsel also objected to the use of the phrase "known legal duty," rather than "known to the defendant." The district court overruled these objections.

[4][5][6] This court reviews a district court's refusal to include a defendant's proposed jury instruction in the charge under an abuse of discretion standard. *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir.1990). The district court abuses its discretion by refusing to include a requested instruction only if that instruction: (1) is substantively correct; (2) is not substantially covered in the charge given to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present effectively a particular defense. *United States v. St. Gelais*, 952 F.2d 90, 93 (5th Cir.1992). Under this test, this court will not find an abuse of discretion where the instructions actually given fairly and adequately cover the issues presented by the case.[11] *Rochester*, 898 F.2d at 978.

[7] As we discussed above, in *Cheek*, 498 U.S. at 201-04, 111 S.Ct. 604, the Supreme Court defined

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[11] Relying on language from *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), Simkanin argues that he was entitled to an instruction on any defense supported by the evidence. However, *Mathews* addresses whether a defendant can simultaneously raise contradictory defenses, and the broader language from *Mathews* has no bearing on the issue presented here because the district court did not deny Simkanin's requested instruction on the basis that it was not supported by sufficient evidence. *See Mathews*, 485 U.S. at 63, 108 S.Ct. 883.

"willfulness" for prosecutions under the IRC as requiring a "voluntary, intentional violation of a known legal duty." The Court further found that, because of the complexity of the federal tax laws, criminal tax offenses with willfulness as an element must be treated as an exception to the general rule that a mistake of law is not a valid defense. *Id.* Thus, a defendant's good-faith belief that he is acting within the law negates the willfulness element. On the other hand, a defendant's good-faith belief that the tax laws are unconstitutional or otherwise invalid does not negate the willfulness requirement, and such evidence is therefore irrelevant to a good-faith defense. *Id.; see also* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.38.

The Supreme Court in *Cheek* derived its definition of willfulness from *United States v. Pomponio*, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (per curiam). In *Pomponio*, a case involving criminal charges of falsifying tax returns, the district court instructed the jury that a willful act meant "one done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law." 429 U.S. at 11, 97 S.Ct. 22 (internal quotation marks omitted) (alterations in original). The district court also instructed the jury that " '[g]ood motive alone is never a defense where the act done or omitted is a crime,' and that consequently ***411** motive was irrelevant except as it bore on intent." *Id.* (alteration in original). The court of appeals held that the final instruction was improper because the relevant statute required a finding of bad purpose or evil motive. *Id.* The Supreme Court reversed, noting that the court of appeals incorrectly assumed that

the reference to "evil motive" in an earlier Supreme Court case meant something more than specific intent to violate the law. *Id.* The Court stated that "willful," as the term is used in the tax statutes, means "a voluntary, intentional violation of a known legal duty." *Id.* The Court determined that because the district court had instructed the jury as to that definition, the jury had been adequately instructed on willfulness, and an additional instruction on good faith was thus unnecessary. *Id.*

[8] Accordingly, the district court in the present case was not required to include a specific instruction on good-faith because it adequately instructed the jury on the meaning of willfulness under *Cheek* and *Pomponio.* In other words, Simkanin's requested instruction was "substantially covered in the charge given to the jury" regarding willfulness. *See St. Gelais,* 952 F.2d at 93. In addition, taken together, the trial, charge, and closing argument laid the theory of the defense squarely before the jury, and the lack of the requested instruction did not seriously impair Simkanin's ability to present effectively his good-faith defense.[12] *Id.; United States v. Proctor,* 118

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[12] As discussed more fully below, Simkanin argues that the district court restricted his ability to present his good-faith defense at trial. However, we address here Simkanin's argument concerning closing argument. Simkanin notes that the district court limited defense counsel to only fifteen minutes for closing argument. However, he concedes that he did not object below on this basis, and he explicitly states that he does not challenge on appeal the district court's limitation of closing argument. At the same time, however, Simkanin argues that the limitation on closing argument should shade our analysis of the issues that he actually raises on appeal. In light of the

Fed.Appx. 862, 863 (5th Cir.2004) (per curiam) (unpublished) (quoting *United States v. Gray*, 751 F.2d 733, 735-36 (5th Cir.1985)).

Finally, Simkanin complains that the phrase "known legal duty" in the instructions did not make it clear that the legal duty must have been known to the defendant. This claim ignores the next sentence of the instructions, which stated: "For the government to establish willfulness as to Counts 1-12 of the indictment, it must prove beyond a reasonable doubt as to the count in consideration *that defendant knew* of the requirements of federal law ... and that he voluntarily and intentionally caused [Arrow] to fail to comply with these requirements." Similarly, Simkanin ignores the actual language of the district court's instructions when, citing FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.37, he asserts that the district court did not instruct the jury that a

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particular circumstances of this case, we do not agree that the limitation on closing argument somehow rendered the instruction on willfulness erroneous. Defense counsel was entirely free to argue, and did in fact argue, the good-faith defense to the jury during the allotted time period, and, as discussed below, the district court did not unfairly restrict Simkanin's presentation of evidence to establish that defense. The restriction on closing was applied evenhandedly to both the defense and the prosecution. The trial lasted only two days and involved relatively few witnesses. It involved a single theory of the defense, which was based on Simkanin's beliefs about the requirements of the federal tax laws (not the validity of those laws, which are irrelevant to willfulness under *Cheek*). Thus, we are not persuaded that the limitation on closing unfairly curtailed defense counsel's ability to present Simkanin's good-faith defense.

defendant did not "knowingly" commit a ***412** tax offense if he acted by mistake. In fact, as noted above, the district court explicitly instructed the jury that "knowingly, as that term has been used in these instructions, means that the act was done voluntarily and intentionally, not because of a mistake or accident." Thus, Simkanin's argument fails.

C. Evidentiary Rulings

[9] Simkanin's last argument with respect to his conviction is that the district court unfairly and arbitrarily excluded defense evidence and restricted the scope of cross-examination, thus hampering the presentation of his good-faith defense. We review a district court's rulings on the admission or exclusion of evidence for an abuse of discretion. *United States v. Flitcraft*, 803 F.2d 184, 186 (5th Cir.1986).

[10] Simkanin argues that the district court erred because it allowed him only briefly to say what he knew, believed, and understood, but that it did not allow him to corroborate his sincerity in these assertions because it excluded from evidence certain documents on which Simkanin allegedly relied for his beliefs about the tax laws.[13] The district court, however, explained that it did so because the documents would tend only to confuse the jury about the relevant issues in the case and were cumulative of Simkanin's testimony about what the documents said and how he relied upon them in forming his beliefs about what the tax laws required

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[13] Simkanin does not specifically identify all of the evidentiary rulings that he claims were erroneous; rather, he advances a broader contention that the district court's evidentiary rulings as a whole prejudiced his ability to assert his defense.

of him. Rule 403 of the Federal Rules of Evidence states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this instance, the district court did not abuse its discretion in concluding that the probative value of this evidence was far outweighed by its tendency to confuse the jury as to the correct state of the law and by its cumulative nature.

In *Flitcraft*, 803 F.2d at 185-86, we addressed the defendants' claim that the district court had erred in excluding the documents upon which they allegedly relied in forming their beliefs about the tax laws; the defendants argued that such documents would increase the likelihood that the jury would credit the sincerity of the defendants' purported beliefs. This court held that the district court did not abuse its discretion in excluding the evidence under Fed.R.Evid. 403 because the documents had little probative value, as they were largely cumulative of the defendants' testimony as to their contents and the defendants' reliance on them. *Flitcraft*, 803 F.2d at 186. Furthermore, we stated that "the documents presented a danger of confusing the jury by suggesting that the law is unsettled and that it should resolve such doubtful questions of law." *Id.*

In *Barnett*, 945 F.2d at 1301, we once again addressed the problem confronting a district court called upon to engage in "the delicate balancing required by Rule 403" when determining the admissibility of evidence to support a defendant's good-faith beliefs in a tax evasion case. We noted "the need to allow the defendant to establish his beliefs through reference to tax law sources and the

need to avoid unnecessarily confusing the jury as to the actual state of the law." *Id.*. Relying on *Flitcraft*, we determined that the district court did not abuse its discretion in excluding ***413** documentary evidence because the district court had allowed the defendant to explain his understanding of the documents while excluding the documents themselves to avoid unnecessarily confusing the jury. *Id.* Thus, as in *Flitcraft* and *Barnett*, we conclude that the district court in the present case did not abuse its discretion in making the evidentiary rulings of which Simkanin complains.[14]

[11][12] With respect to the more specific evidentiary errors alleged by Simkanin, we similarly conclude that the district court did not abuse its discretion. Simkanin claims that the district court erred by admitting a document entitled "Proclamation of Warning," which Simkanin had posted on his website. In summary, the document declared that Simkanin is a servant of God and that public officials should be warned not to harm him or his household, lest they wish to enter "into a state of war against Almighty God" and to suffer "the fury of a fire which will consume [them]." The government responds that Simkanin opened the door to this evidence when defense counsel questioned Simkanin about how his religious beliefs told him

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[14] Simkanin avers that the district court's evidentiary rulings were not evenhanded because it permitted the government to introduce § 3402 as proof that Simkanin had been shown, and therefore actually was aware of, the correct law concerning withholding. However, we do not find this disparity dispositive because the admission of § 3402 did not raise the possibility of confusing the jury in the same manner as the defense exhibits.

not to withhold taxes from the paychecks of his employees. When defense counsel requested that he be able to question Simkanin on his religious beliefs, the government replied that it would open the door to the admission of the Proclamation. The district court acknowledged that it probably would, but it allowed defense counsel the option to proceed with the testimony on Simkanin's religious views. Simkanin testified that the Bible told him that God is entitled to the first fruits of a person's labor and that if he withheld taxes from his employees, then he was stealing the first fruits of their labor. It is not clear why defense counsel introduced Simkanin's own testimony on this issue because his statements that the tax laws contradicted his religious views were irrelevant to his good-faith defense under *Cheek*. It is perhaps less clear what probative value the Proclamation had on the relevant issues, but defense counsel was warned that testimony concerning Simkanin's religious views about the tax laws might open the door to other evidence concerning his religious views. In any event, even if the district court did abuse its discretion in admitting the Proclamation, we are convinced that it was harmless in the overall scheme of the trial. At most, the Proclamation showed that Simkanin held certain beliefs, which would tend to support his good-faith defense rather than refute it.

[13] Next, Simkanin complains that the district court erred by admitting IRS press releases warning taxpayers about various "scams" and "schemes" (including employers who claim that they need not withhold taxes). However, we do not agree that the potentially prejudicial nature of the documents outweighed the probative value of these documents, which showed that Simkanin had been explicitly warned about the illegality of his activities. Thus,

the district court did not abuse its discretion.

[14] Simkanin also argues that, in an in limine ruling, the district court unfairly restrained defense counsel from introducing any documentary evidence without first approaching the bench. The government responds that the district court's ruling ***414** was justified by the nature of the documents on the defense exhibit list, which included the Communist Manifesto, multiple versions of the Bible, and various publications translating Greek and Hebrew. We agree with the government that the district court did not abuse its discretion given this exhibit list. Moreover, the documents actually excluded on the basis of the in limine ruling would have been properly excluded under Rule 403 for the reasons stated above (i.e., they were cumulative and potentially confusing).

[15] Next, Simkanin claims that the district court unfairly restricted the cross-examination of government witnesses, such as IRS agents Cooper and Eastman. The district court prohibited certain questions by defense counsel because the questions were beyond the scope of direct and because, in the court's opinion, the questions attempted to show that the IRS agent's views of the law were incorrect and that Simkanin's views were actually correct. Simkanin argues that defense counsel's questions merely attempted to demonstrate the reasonableness of Simkanin's beliefs. Citing *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (per curiam), Simkanin claims that these rulings violated the Confrontation Clause of the Sixth Amendment. However, the district court did not abuse its discretion in determining that the questions were beyond the scope of direct, *see* Fed.R.Evid. 611(b), and Simkanin was free to recall the witnesses during his presentation of evidence, although he did not attempt to do so.

Thus, his Confrontation Clause rights were not implicated. Moreover, the district court did not abuse its discretion because Simkanin was permitted to testify (and present the testimony of other witnesses) about his beliefs and because this line of questioning may have served to confuse the jury unnecessarily.

D. Upward Departure

With respect to his sentence, Simkanin argues that the district court erred by upwardly departing from the sentencing range established by the Guidelines. Prior to the upward departure, the sentencing range established by the Guidelines was forty-one to fifty-one months imprisonment (for a criminal history category of I and an offense level of Twenty-Two). Simkanin does not contend that the district court erred in calculating this range. However, the district court decided to depart upwardly, and it imposed a sentence of eighty-four months imprisonment. At the sentencing hearing, the district court stated that U.S.S.G. § 5K2.0(a)(2)(B)[15] justified an upward departure because: (1) Simkanin "has displayed contempt and disrespect for the laws of the United States of America, the State of Texas, and the city of Bedford,"

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[15] U.S.S.G. § 5K2.0(a)(2)(B) (2003) provides:

(a) Upward Departures in General and Downward Departures in Criminal Cases Other Than Child Crimes and Sexual Offenses....

(2) Departures Based on Circumstances of a Kind not Adequately Taken into Consideration....

(B) Unidentified Circumstances.--A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

and he has further confirmed that contempt in his conduct since his bail was revoked; (2) he and those who share his views have a cult-like belief that the laws of the United States do not apply to them; (3) Simkanin has entrenched himself in anti-government groups and is part of a movement whose members question the power of the federal government and its instrumentalities, including the federal ***415** courts, to exercise jurisdiction and authority over them; (4) his beliefs have led him to act in a manner inconsistent with the laws of the United States (ranging from giving up his driver's license, threatening to kill federal judges,[16] and failure to comply with the federal tax laws); and (5) the court was satisfied that Simkanin would continue to act on those beliefs in the future. In addition, the district court stated that U.S.S.G. § 4A1.3(a)(1)[17] further justified the departure because, despite Simkanin's lack of a prior criminal record, "based on defendant's radical beliefs relative to the laws of the United States, it is likely that he will commit future tax-related crimes."

The district court explained that in determining the extent of the departure in accordance with

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[16] A person present at a meeting at Simkanin's place of business reported that Simkanin stated "I think we need to knock off a couple of federal judges. That will get their attention."

[17] U.S.S.G. § 4A1.3(a)(1) provides:

(a) Upward Departures.--

(1) Standard for Upward Departure.--If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

U.S.S.G. § 4A1.3(a)(4),[18] the court used "as a reference, the criminal history category applicable to defendants whose likelihood to recidivate most closely resembles that of the defendant's." The court concluded that, for the reasons already discussed, Simkanin's likelihood to recidivate most closely resembles that of defendants whose criminal history category is VI. This produced a total offense level of Twenty-Two and a criminal history category of VI, resulting in a sentencing range of 84-105 months. The district court then sentenced at the bottom of that range and imposed an eighty-four month sentence.

Simkanin argues that the district court erred in imposing an upward departure on the grounds articulated at the sentencing hearing because: (1) it did not include a written statement of reasons in the judgment as required by 18 U.S.C. § 3553(c)(2);[19] (2) the district court impermissibly based its

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[18] U.S.S.G. § 4A1.3(a)(4) provides:
(4) Determination of Extent of Upward Departure.--
(A) In General.--Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

[19] Section 3553(c) provides:
(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--
(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment ....

departure on grounds involving Simkanin's associations and beliefs, in violation of the First Amendment; and (3) the district court's belief that Simkanin posed a danger of recidivism was not supported by evidence.

[16] We recently discussed the appropriate standard of review to employ when reviewing a district court's decision to depart upwardly from the sentencing range established by the Guidelines. *See United States v. Smith*, 417 F.3d 483, 489-92, 2005 WL 1663784, *4-6 (5th Cir. July 18, 2005). ***416** There, we explained that the Supreme Court's decision in *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), directed us to return essentially to the abuse-of-discretion standard employed prior to 2003:

> Prior to 2003, our review of departure decisions was for abuse of discretion, pursuant to § 3742(e). In April 2003, Congress amended § 3742(e), altering our standard of review with respect to the departure decision to *de novo*. Under this scheme, while the *decision* to depart was reviewed *de novo*, the *degree* of departure was still reviewed for abuse of discretion. Then, in January 2005, the Supreme Court in *Booker* excised § 3742(e), leaving the appellate courts to review sentences for reasonableness. The Court explained that it was essentially returning to the standard of review provided by the pre-2003 text, which directs us to determine whether the sentence is unreasonable with regard to § 3553(a). Section 3553(a) remains in effect, and its factors guide us in determining whether a sentence is unreasonable.

Smith, 417 F.3d at 489-90, 2005 WL 1663784 at *4

(footnotes and internal quotation marks omitted);[20] *see also* *id.* at 490 n. 24, 2005 WL 1663784 at *4 n. 24; *United States v. Harris*, 293 F.3d 863, 871 (5th Cir.2002).[21] [FN21] Applying this standard, we

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[20] As the *Smith* court noted, 18 U.S.C. 3553(a) states:
(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ...;
(5) any pertinent [sentencing guidelines] policy statement ... [;]
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

[21] In *Harris*, 293 F.3d at 871, the court stated:
We review a district court's departure from the range established by the Guidelines for abuse of discretion.

conclude that Simkanin is not entitled to resentencing.

[17] First, Simkanin argues that the district court did not include its written statement of reasons in its judgment of conviction and sentence as required by 18 U.S.C. § 3553(c)(2). We disagree. The judgment clearly states that the Statement of Reasons and personal information about ***417** the defendant are set forth in an attachment to the judgment. Although Simkanin argued in his principal brief that the district court never drafted a written statement of reasons, he concedes in his reply brief that the court did so and that the written statement is virtually identical to the oral reasons given by the district court at sentencing. He also concedes that, after he filed his initial brief, he received a copy of the written statement, which was in the sealed part of the appellate record, as is the common practice in this circuit, and was available to defense counsel. Thus, Simkanin's argument that the district court did not author and include in the record a written statement of reasons is wrong. Furthermore, we find no merit in Simkanin's unsupported argument in his supplemental brief

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The district court's decision is accorded substantial deference because it is a fact intensive assessment and the district court's findings of fact are reviewed for clear error. However, the district court's interpretation of the Guidelines is a question of law, reviewed *de novo;* a district court abuses its discretion by definition when it makes an error of law. Determining whether a factor is permissible to take into account when considering a departure is one of these questions of law. A district court abuses its discretion if it departs on the basis of legally unacceptable reasons or if the degree of the departure is unreasonable.
(internal citations omitted).

that he is entitled to resentencing simply because the written reasons were attached to the judgment and referenced after the judge's signature, as opposed to appearing before the judge's signature.

[18] Second, Simkanin argues that the district court erred because it upwardly departed on an impermissible basis--namely, because of his associations and beliefs. Given the particular facts of this case, however, his argument fails. In *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992), the Supreme Court held that it was constitutional error to admit a stipulation of the defendant's membership in a racist prison gang, The Aryan Brotherhood, as an aggravating factor for consideration in sentencing. *Dawson*, 503 U.S. at 164-67, 112 S.Ct. 1093. The Court reasoned that the defendant's membership had no relevance whatsoever to the crime in question, which was not racially motivated or otherwise connected to the beliefs of the gang, and it noted that the prosecution had introduced (via a stipulation) evidence establishing only that defendant was a member and that the gang held white supremacist views, not any evidence showing the gang's violent and unlawful tendencies. *Id.* The Court explicitly recognized, however, that consideration of a defendant's beliefs and associations might be appropriate in some instances in making sentencing decisions about the likelihood that the defendant will engage in future criminal activity. *Id.* at 165-66, 112 S.Ct. 1093. The Court stated that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 165, 112 S.Ct. 1093. Moreover, the Court explained that "[i]n many

cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society[;][a] defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future." *Id.* at 166, 112 S.Ct. 1093.

Simkanin's beliefs and associations may be considered if they were "sufficiently related to the issues at sentencing." *Boyle v. Johnson*, 93 F.3d 180, 183-85 (5th Cir.1996). Here, Simkanin's sentence was not increased merely because of his abstract beliefs or associations. Rather, Simkanin's specific beliefs that the tax laws are invalid and do not require him to withhold taxes or file returns (and his association with an organization that endorses the view that free persons are not required to pay income taxes on their wages) are directly related to the crimes in question and demonstrate a likelihood of recidivism.[22] Thus, ***418** the district court did not constitutionally err in considering

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[22] This court reached a similar conclusion in an unpublished opinion, *United States v. Tampico*, 297 F.3d 396 (5th Cir.2002) (per curiam) (unpublished), a child pornography case in which the court upheld an upward departure that was based in part on the defendant's membership in the North American Man Boy Love Association, which advocates sexual relationships between men and underage boys. The court concluded that the defendant's membership in the organization was relevant to sentencing because it may indicate the increased likelihood of recidivism. *Tampico*, 297 F.3d at 402-03. As Simkanin correctly points out, *Tampico* is not binding precedent. Nonetheless, its reasoning is persuasive in light of *Dawson* and *Boyle*.

these factors. *See* id. at 183-85; *see also* Fuller v. Johnson, 114 F.3d 491, 497-98 (5th Cir.1997) (finding that the defendant's membership in a racist gang was properly considered in sentencing because it went to future dangerousness in light of the evidence showing the gang's violent tendencies).[23]

Simkanin also briefly argues that the district court's finding that he held "contempt and disrespect for the law" was not a proper basis for upward departure. Relying solely on *United States v. Andrews*, 390 F.3d 840, 847- 48 (5th Cir.2004), he claims that the appropriate action for the district court to take in response to such contempt is the

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[23] The other Supreme Court cases cited by Simkanin on the constitutional question are inapposite. *See* Wisconsin v. Mitchell, 508 U.S. 476, 485, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) (upholding a statute that increases punishment for crimes committed with a racially motivated intent); *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) (holding that the First Amendment right to petition is no shield against liability for libel); *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam) (holding that a statute prohibiting threats against the President did not constitutionally apply to criminalize the defendant's conditional and hyperbolic political comment); *Noto v. United States*, 367 U.S. 290, 297-98, 299-300, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961) (addressing a conviction under the membership clause of the Smith Act and finding evidence insufficient to show a present advocacy of overthrow); *R.A.V. v. Minnesota*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (holding unconstitutional on First Amendment grounds a law criminalizing conduct such as placing a burning cross or Nazi swastika, which one knows to arouse anger, alarm, or resentment on the basis of race, religion, etc.).

denial of a downward adjustment for acceptance of responsibility. However, *Andrews* involved a district court's upward departure expressly based in part on the defendant's failure to take responsibility (i.e., his lack of paid restitution, attempts to blame others for his behavior, and insincerity in his proffered words of remorse). The district court in the present case did not base its upward departure on the defendant's lack of acceptance of responsibility, but rather on the likelihood that he would recidivate. *Andrews*, therefore, is inapposite.[24]

At oral argument, defense counsel contended that the district court erred because it departed upwardly on the basis of Simkanin's firmly held beliefs and that this reasoning contradicted the government's position, and the jury's finding, that Simkanin did not hold good-faith belief that he was not obligated to file income returns or withhold taxes from the paychecks of Arrow's employees. However, as the government correctly responded, the district ***419** court's decision to depart upwardly did not contradict the jury's finding that Simkanin did not have a valid good-faith defense under *Cheek*. As discussed above, Simkanin's avowed position was that he would not comply with the tax laws,

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[24] Simkanin also challenges the district court's ability to predict the likelihood of recidivism, stating that even trained scientists cannot accurately make such predictions. The Guidelines, however, clearly permit a district court to depart upwardly if it believes that reliable information suggests that the defendant's likelihood to recidivate is not adequately represented by the range established. *See* U.S.S.G. § 4A1.3(a)(1). Obviously, nothing in the Guidelines or our case law suggests that the district court must be able to predict recidivism with scientific certainty.

and the reason for his position was that the tax laws were both inapplicable to him and invalid for a number of reasons beyond the boundaries of a legitimate good-faith defense under *Cheek*. At sentencing, Simkanin made clear to the district court that he continued to hold these beliefs when he stated that he still "firmly believed" that the Bible, the Constitution, and the Declaration of Independence all agree that "the wages of a laborer are withheld through fraud." Thus, the district court was convinced that Simkanin's likelihood to recidivate was not adequately reflected by the Guidelines range, and it did not abuse its discretion in upwardly departing from that range.

[19][20] Finally, Simkanin contends that the extent of the upward departure was unreasonable. The district court upwardly departed from a range of forty-one to fifty-one months imprisonment to impose a sentence of eighty-four months. Simkanin argues that the district court failed to articulate the reasons "why a sentence commensurate with a bypassed criminal history category was not selected." *United States v. Lambert*, 984 F.2d 658, 663 (5th Cir.1993) (en banc). Simkanin is correct that the district court did not specifically state why it rejected each of the preceding criminal history categories. However, as the government correctly notes, this court does "not require the district court to go through a 'ritualistic exercise' where ... it is evident from the stated grounds for departure why the bypassed criminal history categories were inadequate." *United States v. Ashburn*, 38 F.3d 803, 809 (5th Cir.1994) (en banc) (quoting *Lambert*, 984 F.2d at 663). Simkanin correctly notes that it was clearer in *Ashburn* why the district court had decided that defendant's criminal history category did not adequately reflect his prior history--the

district court in *Ashburn* noted that the defendant had committed a series of robberies for which he was never convicted. *Id.* However, the district court in the present case explained that it was convinced that Simkanin's membership in a group with radical views rejecting the laws of the United States and his professed beliefs that he is not required to abide by the tax laws would lead him to commit other tax-related crimes. Moreover, the mere fact that the upward departure nearly doubled the Guidelines range does not render it unreasonable. *See United States v. Daughenbaugh*, 49 F.3d 171, 174-75 (5th Cir.1995) (upholding departure from Guidelines range of fifty-seven to seventy-one months to a sentence of 240 months); *Ashburn*, 38 F.3d at 809 (upholding departure from range of sixty-three to seventy-eight months to sentence of 180 months). Therefore, we are persuaded, guided by the factors in § 3553(a), that the sentence imposed was reasonable for the reasons given by the district court.

E. Booker Error

[21] Simkanin argues that he is entitled to resentencing under *Booker*. He concedes that he did not object on relevant grounds in the district court and that our review is therefore for plain error. *See United States v. Mares*, 402 F.3d 511, 520 (5th Cir.2005). The basis of Simkanin's *Booker* argument is that the district court erred by enhancing his sentence based on facts not admitted by the defendant nor found by the jury. He claims that this court should focus solely on this alleged enhancement error without considering the effect of the Guidelines' mandatory nature at the time that he was sentenced. ***420** This argument fails under *Mares* because the proper inquiry for *Booker* error

under the plain-error test is whether "the result would have likely been different had the judge been sentencing under the *Booker* advisory regime rather than the pre-*Booker* mandatory regime."[25] *Mares*, 402 F.3d at 522. Simkanin clearly has not met his burden because he has pointed to nothing in the record suggesting that he would have received a lower sentence had he been sentenced under the post-*Booker* advisory Guidelines. His assertion that other defendants with similar records who have committed similar offenses have received shorter sentences does nothing to show that he was prejudiced by the district court's assumption that the Guidelines were mandatory. Furthermore, Simkanin's suggestion that we should simply disregard the Supreme Court's remedial majority in *Booker*, including its explicit instruction to apply its remedial interpretation of the Guidelines to all cases pending on direct appeal, is obviously unconvincing. *See, e.g.*, *Booker*, 125 S.Ct. at 769; *cf. United States v. Scroggins*, 411 F.3d 572, 576-77 (5th Cir.2005). Finally, because we conclude that Simkanin is not entitled to resentencing, we need not address his argument that the district court's sentencing options would be limited on remand.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Simkanin's conviction and sentence.

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[25] Indeed, Simkanin explicitly recognizes that his position is foreclosed by *Mares*, and it is therefore unavailing. *See Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir.1997) (noting that one panel of this circuit may not overturn another panel absent an intervening decision to the contrary by the Supreme Court or this court en banc).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10531

U.S. COURT OF APPEALS
F I L E D
OCT 27 2005
CHARLES R. FULBRUGE III
CLERK

UNITED STATES
OF AMERICA
Plaintiff – Appellee

v.

RICHARD MICHAEL
SIMKANIN
Defendant – Appellant

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion 8/5/05, 5 Cir., _____, _____ F.3d _____)

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL,* District Judge.

PER CURIAM:

(*x*) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

S/ Carolyn Dineen King
United States Circuit Judge

* District Judge of the Southern District of Texas, sitting by designation.

REHG-6a

APPENDIX C

Chapter 21. -- Federal Insurance Contributions Act

* * * *

Subchapter A. -- Tax on Employees

§ 3101. Rate of Tax.

(a) Old-age, survivors, and disability insurance. In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))--

In cases of wages received during:	The rate shall be:
1984, 1985, 1986, or 1987	5.7 percent
1988 or 1989	6.06 percent
1990 or thereafter	6.2 percent.

(b) Hospital insurance. In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))--

(1) with respect to wages received during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages received during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages received during the calendar years 1979 and 1980, the rate shall be 1.05 percent;

(4) with respect to wages received during the

calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages received during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages received after December 31, 1985, the rate shall be 1.45 percent.

(c) Relief from taxes in cases covered by certain international agreements. During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement exclusively to the laws applicable to the social security system of such foreign country.

§ 3102. Deduction of Tax from Wages.

(a) Requirement. The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than the applicable dollar threshold (as defined in section 3121(x)) for such year; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of

remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $100; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

(b) Indemnification of employer. Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(c) Special rule for tips.

(1) In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a), and only to the extent that collection can be made by the employer, at or after the

time such statement is so furnished and before the close of the 10th day following the calendar month (or, if paragraph (3) applies, the 30th day following the year) in which the tips were deemed paid, by deducting the amount of the tax from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) as are under control of the employer.

(2) If the tax imposed by section 3101, with respect to tips which are included in written statements furnished in any month to the employer pursuant to section 6053(a), exceeds the wages of the employee (excluding tips) from which the employer is required to collect the tax under paragraph (1), the employee may furnish to the employer on or before the 10th day of the following month (or, if paragraph (3) applies, on or before the 30th day of the following year) an amount of money equal to the amount of the excess.

(3) The Secretary may, under regulations prescribed by him, authorize employers—

(A) to estimate the amount of tips that will be reported by the employee pursuant to section 6053(a) in any calendar year,

(B) to determine the amount to be deducted upon each payment of wages (exclusive of tips) during such year as if the tips so estimated constituted the actual tips so reported, and

(C) to deduct upon any payment of wages (other than tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) to such employee during such year (and within 30 days

thereafter) such amount as may be necessary to adjust the amount actually deducted upon such wages of the employee during the year to the amount required to be deducted in respect of tips included in written statements furnished to the employer during the year.

(4) If the tax imposed by section 3101 with respect to tips which constitute wages exceeds the portion of such tax which can be collected by the employer from the wages of the employee pursuant to paragraph (1) or paragraph (3), such excess shall be paid by the employee.

(d) Special rule for certain taxable group-term life insurance benefits. (1) In general. In the case of any payment for group-term life insurance to which this subsection applies--

(A) subsection (a) shall not apply,

(B) the employer shall separately include on the statement required under section 6051--

(i) the portion of the wages which consists of payments for group-term life insurance to which this subsection applies, and

(ii) the amount of the tax imposed by section 3101 on such payments, and

(C) the tax imposed by section 3101 on such payments shall be paid by the employee.

(2) Benefits to which subsection applies. This subsection shall apply to any payment for group-term life insurance to the extent--

(A) such payment constitutes wages, and

(B) such payment is for coverage for periods during which an employment relationship no longer exists between the employee and the employer.

(e) Special rule for certain transferred Federal employees. In the case of any payments of wages for service performed in the employ of an

international organization pursuant to a transfer to which the provisions of section 3121(y) are applicable--

(1) subsection (a) shall not apply,

(2) the head of the Federal agency from which the transfer was made shall separately include on the statement required under section 6051--

(A) the amount determined to be the amount of the wages for such service, and

(B) the amount of the tax imposed by section 3101 on such payments, and

(3) the tax imposed by section 3101 on such payments shall be paid by the employee.

* * * *

Subchapter B. -- Tax on Employers

§ 3111. Rate of Tax.

(a) Old-age, survivors, and disability insurance. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))--

In cases of wages received during:	The rate shall be:
1984, 1985, 1986, or 1987	5.7 percent
1988 or 1989	6.06 percent
1990 or thereafter	6.2 percent.

(b) Hospital insurance. addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect

to employment (as defined in section 3121(b))--

(1) with respect to wages paid during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages paid during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages paid during the calendar years 1979 and 1980, the rate shall be 1.05 percent;

(4) with respect to wages paid during the calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages paid during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages paid after December 31, 1985, the rate shall be 1.45 percent.

(c) Relief from taxes in cases covered by certain international agreements. During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement exclusively to the laws applicable to the social security system of such foreign country.

* * * *

Subchapter C--General Provisions

§ 3121 Definitions

(a) Wages. For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than

cash; except that such term shall not include--

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to

such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of--

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workmen's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[**(3)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of

6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary--

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)--

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is

less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless--

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500,

except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks

during the preceding calendar year;

[**(9)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid--

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated.[;]

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;
(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;
(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than $100;
(17) any contribution, payment, or service provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans);
(18) any payment made, or benefit furnished, to or for the benefit of an employee, if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);
(19) the value of any meals or lodging furnished

by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights); or

(22) remuneration on account of--

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment. For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include--

(1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) domestic service performed in a local college club, or local chapter of a college fraternity or sorority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) service performed by a child under the age of 18 in the employ of his father or mother;

(B) service not in the course of the employer's trade or business, or domestic service in a

private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if--

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B)(i) such individual is not a citizen

of the United States or (ii) the employer is not an American employer;

(5) service performed in the employ of the United States or any instrumentality of the United States, if such service--

(A) would be excluded from the term "employment" for purposes of this title if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and

(B) is performed by an individual who--

(i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause--

(I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,

(II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of title 5, United States Code, or under section 3581 of chapter 35 of such title, then the service performed for that organization shall be considered service described in subparagraph (A),

(III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being

separated from such service for the purpose of accepting employment with the American Institute in Taiwan as provided under section 3310 of chapter 48 of title 22, United States Code, then the service performed for that Institute shall be considered service described in subparagraph (A),

(IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of title 38, United States Code, then the service so performed as a member of a uniformed service shall be considered service described in subparagraph (A), and

(V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 105(e)(2) of the Indian Self-Determination Act applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or

(ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for

members of the uniformed service);

except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs--

(C) service performed as the President or Vice President of the United States,

(D) service performed--

(i) in a position placed in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code,

(ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or

(iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of title 3, United States Code, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule,

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge,

(F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress,

(G) any other service in the legislative branch

of the Federal Government if such service--

(i) is performed by an individual who was not subject to subchapter III of chapter 83 of title 5, United States Code, or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or

(ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under section 8342(a) of title 5, United States Code, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or

(iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of title 5, United States Code (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983,

and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such

title applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b) such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), or

(H) service performed by an individual--

(i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986, section 307 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2157), or the Federal Employees' Retirement System Open Enrollment Act of 1997 to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code, or

(ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980, to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act;

(6) service performed in the employ of the United States or any instrumentality of the United States if such service is performed--

(A) in a penal institution of the United States by an inmate thereof;

(B) by any individual as an employee included under section 5351(2) of title 5, United States

Code (relating to certain interns, student nurses, and other student employees of hospitals of the Federal Government), other than as a medical or dental intern or a medical or dental resident in training; or

(C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of--

(A) service which, under subsection (j), constitutes covered transportation service,

(B) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this title with respect to the taxes imposed by this chapter--

(i) any person whose service as such an officer or employee is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the

Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,

(C) service performed in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States (other than the Federal Employees Retirement System provided in chapter 84 of title 5, United States Code [5 U.S.C.A. § 8401 et seq.]); except that the provisions of this subparagraph shall not be applicable to service performed--

(i) in a hospital or penal institution by a patient or inmate thereof;

(ii) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(D) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a

temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (B) shall apply,

(E) service included under an agreement entered into pursuant to section 218 of the Social Security Act, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed--

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after

January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 1402(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self-employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary, the term "retirement system" has the meaning given such term by section 218(b)(4) of the Social Security Act;

(8)(A) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;

(B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a));

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

(10) service performed in the employ of--

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government--

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign

government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law;

(14)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(15) service performed in the employ of an international organization, except service which constitutes "employment" under subsection (y);

(16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which--

(A) such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(B) the agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(C) the amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced;

(17) service in the employ of any organization which is performed (A) in any year during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956;

(18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii));

(19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;

(20) service (other than service described in paragraph (3)(A)) performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which—

(A) such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration--

(i) which does not exceed $100 per trip;

(ii) which is contingent on a minimum catch; and

(iii) which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry,

(B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals; or

(21) domestic service in a private home of the employer which--

(A) is performed in any year by an individual under the age of 18 during any portion of

such year; and

(B) is not the principal occupation of such employee.

For purposes of paragraph (20), the operating crew of a boat shall be treated as normally made up of fewer than 10 individuals if the average size of the operating crew on trips made during the preceding 4 calendar quarters consisted of fewer than 10 individuals.

(c) Included and excluded service. For purposes of this chapter, if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (b)(9).

(d) Employee. For purposes of this chapter, the term "employee" means--

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2)).

who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(B) as a full-time life insurance salesman;

(C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the

nature of a single transaction not part of a continuing relationship with the person for whom the services are performed; or

(4) any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act.

(e) State, United States, and citizen. For purposes of this chapter--

(1) State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) United States. The term "United States" when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

An individual who is a citizen of the Commonwealth of Puerto Rico (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

(f) American vessel and aircraft. For purposes of this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State; and the term "American aircraft" means an aircraft registered under the laws of the United States.

(g) Agricultural labor. For purposes of this chapter, the term "agricultural labor" includes all service performed--

(1) on a farm, in the employ of any person, in

connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) in connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) in the employ of a group of operators of farms (other than a cooperative organization)

in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(C) the provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) on a farm operated for profit if such service is not in the course of the employer's trade or business.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(h) American employer. For purposes of this chapter, the term "American employer" means an employer which is--

(1) the United States or any instrumentality thereof,

(2) an individual who is a resident of the United States,

(3) a partnership, if two-thirds or more of the partners are residents of the United States,

(4) a trust, if all of the trustees are residents of the United States, or

(5) a corporation organized under the laws of the United States or of any State.

(i) Computation of wages in certain cases. (1) Domestic service. For purposes of this chapter, in the case of domestic service described in subsection (a)(7)(B), any payment of cash remuneration for such service which is more or less than a whole-dollar amount shall, under such conditions and to such extent as may be prescribed by regulations made under this chapter, be computed to the nearest dollar. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to $1. The amount of any payment of cash remuneration so computed to the nearest dollar shall, in lieu of the amount actually paid, be deemed to constitute the amount of cash remuneration for purposes of subsection (a)(7)(B).

(2) Service in the uniformed services. For purposes of this chapter, in the case of an individual performing service, as a member of a uniformed service, to which the provisions of subsection (m)(1) are applicable, the term "wages" shall, subject to the provisions of subsection (a)(1) of this section, include as such individual's remuneration for such service only (A) his basic pay as described in chapter 3 and section 1009 of title 37, United States Code, in the case of an individual performing service to which subparagraph (A) of such subsection (m)(1) applies, or (B) his compensation for such service as determined

under section 206(a) of title 37, United States Code, in the case of an individual performing service to which subparagraph (B) of such subsection (m)(1) applies.

(3) Peace Corps volunteer service. For purposes of this chapter, in the case of an individual performing service, as a volunteer or volunteer leader within the meaning of the Peace Corps Act, to which the provisions of section 3121(p) are applicable, the term "wages" shall, subject to the provisions of subsection (a)(1) of this section, include as such individual's remuneration for such service only amounts paid pursuant to section 5(c) or 6(*l*) of the Peace Corps Act.

(4) Service performed by certain members of religious orders. For purposes of this chapter, in any case where an individual is a member of a religious order (as defined in subsection (r)(2)) performing service in the exercise of duties required by such order, and an election of coverage under subsection (r) is in effect with respect to such order or with respect to the autonomous subdivision thereof to which such member belongs, the term "wages" shall, subject to the provisions of subsection (a)(1), include as such individual's remuneration for such service the fair market value of any board, lodging, clothing, and other perquisites furnished to such member by such order or subdivision thereof or by any other person or organization pursuant to an agreement with such order or subdivision, except that the amount included as such individual's remuneration under this paragraph shall not be less than $100 a month.

(5) Service performed by certain retired justices and judges. For purposes of this chapter, in the case of an individual performing service under the provisions of section 294 of title 28, United States Code (relating to assignment of retired justices and judges to active duty), the term "wages" shall not include any payment under section 371(b) of such title 28 which is received during the period of such service.

(j) Covered transportation service. For purposes of this chapter--

(1) Existing transportation systems--General rule. Except as provided in paragraph (2), all service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system shall constitute covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and prior to 1951.

(2) Existing transportation systems--Cases in which no transportation employees, or only certain employees, are covered. Service performed in the employ of a State or political subdivision in connection with the operation of its public transportation system shall not constitute covered transportation service if--

(A) any part of the transportation system was acquired from private ownership after 1936 and prior to 1951, and substantially all service in connection with the operation of the transportation system was, on December 31, 1950, covered under a general retirement system providing benefits which, by reason of a provision of the State constitution dealing specifically with retirement systems of the

State or political subdivisions thereof, cannot be diminished or impaired; or

(B) no part of the transportation system operated by the State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and prior to 1951;

except that if such State or political subdivision makes an acquisition after 1950 from private ownership of any part of its transportation system, then, in the case of any employee who-

(C) became an employee of such State or political subdivision in connection with and at the time of its acquisition after 1950 of such part, and

(D) prior to such acquisition rendered service in employment (including as employment service covered by an agreement under section 218 of the Social Security Act) in connection with the operation of such part of the transportation system acquired by the State or political subdivision,

the service of such employee in connection with the operation of the transportation system shall constitute covered transportation service, commencing with the first day of the third calendar quarter following the calendar quarter in which the acquisition of such part took place, unless on such first day such service of such employee is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees described in subparagraph (C).

(3) Transportation systems acquired after 1950. All service performed in the employ of a State or political subdivision thereof in

connection with its operation of a public transportation system shall constitute covered transportation service if the transportation system was not operated by the State or political subdivision prior to 1951 and, at the time of its first acquisition (after 1950) from private ownership of any part of its transportation system, the State or political subdivision did not have a general retirement system covering substantially all service performed in connection with the operation of the transportation system.

(4) Definitions. For purposes of this subsection--

(A) The term "general retirement system" means any pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof for employees of the State, political subdivision, or both; but such term shall not include such a fund or system which covers only service performed in positions connected with the operation of its public transportation system.

(B) A transportation system or a part thereof shall be considered to have been acquired by a State or political subdivision from private ownership if prior to the acquisition service performed by employees in connection with the operation of the system or part thereof acquired constituted employment under this chapter or subchapter A of chapter 9 of the Internal Revenue Code of 1939 or was covered by an agreement made pursuant to section 218 of the Social Security Act and some of such employees became employees of the State or political subdivision in connection

with and at the time of such acquisition.

(C) The term "political subdivision" includes an instrumentality of--

(i) a State,

(ii) one or more political subdivisions of a State, or

(iii) a State and one or more of its political subdivisions.

[(k) Repealed. Pub.L. 98-21, Title I, § 102(b)(2), Apr. 20, 1983, 97 Stat. 71]

(l) Agreements entered into by American employers with respect to foreign affiliates.

(1) Agreement with respect to certain employees of foreign affiliate. The Secretary shall, at the American employer's request, enter into an agreement (in such manner and form as may be prescribed by the Secretary) with any American employer (as defined in subsection (h)) who desires to have the insurance system established by title II of the Social Security Act extended to service performed outside the United States in the employ of any 1 or more of such employer's foreign affiliates (as defined in paragraph (6)) by all employees who are citizens or residents of the United States, except that the agreement shall not apply to any service performed by, or remuneration paid to, an employee if such service or remuneration would be excluded from the term "employment" or "wages", as defined in this section, had the service been performed in the United States. Such agreement may be amended at any time so as to be made applicable, in the same manner and under the same conditions, with respect to any other foreign affiliate of such American employer. Such agreement shall be applicable

with respect to citizens or residents of the United States who, on or after the effective date of the agreement, are employees of and perform services outside the United States for any foreign affiliate specified in the agreement. Such agreement shall provide--

(A) that the American employer shall pay to the Secretary, at such time or times as the Secretary may by regulations prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 3101 and 3111 (including amounts equivalent to the interest, additions to the taxes, additional amounts, and penalties which would be applicable) with respect to the remuneration which would be wages if the services covered by the agreement constituted employment as defined in this section; and

(B) that the American employer will comply with such regulations relating to payments and reports as the Secretary may prescribe to carry out the purposes of this subsection.

(2) Effective period of agreement. An agreement entered into pursuant to paragraph (1) shall be in effect for the period beginning with the first day of the calendar quarter in which such agreement is entered into or the first day of the succeeding calendar quarter, as may be specified in the agreement; except that in case such agreement is amended to include the services performed for any other affiliate and such amendment is executed after the first month following the first calendar quarter for which the agreement is in effect, the agreement shall be in effect with respect to service performed for such other affiliate only after the calendar quarter in which such amendment is

executed. Notwithstanding any other provision of this subsection, the period for which any such agreement is effective with respect to any foreign entity shall terminate at the end of any calendar quarter in which the foreign entity, at any time in such quarter, ceases to be a foreign affiliate as defined in paragraph (6).

(3) No termination of agreement. No agreement under this subsection may be terminated, either in its entirety or with respect to any foreign affiliate, on or after June 15, 1989.

(4) Deposits in trust funds. For purposes of section 201 of the Social Security Act, relating to appropriations to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, such remuneration--

(A) paid for services covered by an agreement entered into pursuant to paragraph (1) as would be wages if the services constituted employment, and

(B) as is reported to the Secretary pursuant to the provisions of such agreement or of the regulations issued under this subsection,

shall be considered wages subject to the taxes imposed by this chapter.

(5) Overpayments and underpayments. (A) If more or less than the correct amount due under an agreement entered into pursuant to this subsection is paid with respect to any payment of remuneration, proper adjustments with respect to the amounts due under such agreement shall be made, without interest, in such manner and at such times as may be required by regulations prescribed by the Secretary.

(B) If an overpayment cannot be adjusted under subparagraph (A), the amount thereof shall be paid by the Secretary, through the Fiscal Service of the Treasury Department, but only if a claim for such overpayment is filed with the Secretary within two years from the time such overpayment was made.

(6) Foreign affiliate defined. For purposes of this subsection and section 210(a) of the Social Security Act--

(A) In general. A foreign affiliate of an American employer is any foreign entity in which such American employer has not less than a 10-percent interest.

(B) Determination of 10-percent interest. For purposes of subparagraph (A), an American employer has a 10-percent interest in any entity if such employer has such an interest directly (or through one or more entities)--

(i) in the case of a corporation, in the voting stock thereof, and

(ii) in the case of any other entity, in the profits thereof.

(7) American employer as separate entity. Each American employer which enters into an agreement pursuant to paragraph (1) of this subsection shall, for purposes of this subsection and section 6413(c)(2)(C), relating to special refunds in the case of employees of certain foreign entities, be considered an employer in its capacity as a party to such agreement separate and distinct from its identity as a person employing individuals on its own account.

(8) Regulations. Regulations of the Secretary to carry out the purposes of this subsection

shall be designed to make the requirements imposed on American employers with respect to services covered by an agreement entered into pursuant to this subsection the same, so far as practicable, as those imposed upon employers pursuant to this title with respect to the taxes imposed by this chapter.

(m) Service in the uniformed services. For purposes of this chapter--

(1) Inclusion of service. The term "employment" shall, notwithstanding the provisions of subsection (b) of this section, include--

(A) service performed by an individual as a member of a uniformed service on active duty, but such term shall not include any such service which is performed while on leave without pay, and

(B) service performed by an individual as a member of a uniformed service on inactive duty training.

(2) Active duty. The term "active duty" means "active duty" as described in paragraph (21) of section 101 of title 38, United States Code, except that it shall also include "active duty for training" as described in paragraph (22) of such section.

(3) Inactive duty training. The term "inactive duty training" means "inactive duty training" as described in paragraph (23) of such section 101.

(n) Member of a uniformed service. For purposes of this chapter, the term "member of a uniformed service" means any person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard (including a reserve component as defined in section 101(27) of

title 38, United States Code), or in one of those services without specification of component, or as a commissioned officer of the Coast and Geodetic Survey, the National Oceanic and Atmospheric Administration Corps, or the Regular or Reserve Corps of the Public Health Service, and any person serving in the Army or Air Force under call or conscription. The term includes--

(1) a retired member of any of those services;

(2) a member of the Fleet Reserve or Fleet Marine Corps Reserve;

(3) a cadet at the United States Military Academy, a midshipman at the United States Naval Academy, and a cadet at the United States Coast Guard Academy or United States Air Force Academy;

(4) a member of the Reserve Officers' Training Corps, the Naval Reserve Officers' Training Corps, or the Air Force Reserve Officers' Training Corps, when ordered to annual training duty for fourteen days or more, and while performing authorized travel to and from that duty; and

(5) any person while en route to or from, or at, a place for final acceptance or for entry upon active duty in the military, naval, or air service-

(A) who has been provisionally accepted for such duty; or

(B) who, under the Military Selective Service Act, has been selected for active military, naval, or air service;

and has been ordered or directed to proceed to such place.

The term does not include a temporary member of the Coast Guard Reserve.

(o) Crew leader. For purposes of this chapter, the term "crew leader" means an individual who

furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person; and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader. For purposes of this chapter and chapter 2, a crew leader shall, with respect to service performed in furnishing individuals to perform agricultural labor for another person and service performed as a member of the crew, be deemed not to be an employee of such other person.

(p) Peace Corps volunteer service. For purposes of this chapter, the term "employment" shall, notwithstanding the provisions of subsection (b) of this section, include service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act.

(q) Tips included for both employee and employer taxes. For purposes of this chapter, tips received by an employee in the course of his employment shall be considered remuneration for such employment (and deemed to have been paid by the employer for purposes of subsections (a) and (b) of section 3111). Such remuneration shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received; except that, in determining the employer's liability in connection with the taxes imposed by section 3111 with respect to such tips in any case

where no statement including such tips was so furnished (or to the extent that the statement so furnished was inaccurate or incomplete), such remuneration shall be deemed for purposes of subtitle F to be paid on the date on which notice and demand for such taxes is made to the employer by the Secretary.

(r) Election of coverage by religious orders. (1) Certificate of election by order. A religious order whose members are required to take a vow of poverty, or any autonomous subdivision of such order, may file a certificate (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) electing to have the insurance system established by title II of the Social Security Act extended to services performed by its members in the exercise of duties required by such order or such subdivision thereof. Such certificate of election shall provide that--

(A) such election of coverage by such order or subdivision shall be irrevocable;

(B) such election shall apply to all current and future members of such order, or in the case of a subdivision thereof to all current and future members of such order who belong to such subdivision;

(C) all services performed by a member of such an order or subdivision in the exercise of duties required by such order or subdivision shall be deemed to have been performed by such member as an employee of such order or subdivision; and

(D) the wages of each member, upon which such order or subdivision shall pay the taxes imposed by sections 3101 and 3111, will be determined as provided in subsection (i)(4).

(2) Definition of member. For purposes of this subsection, a member of a religious order means any individual who is subject to a vow of poverty as a member of such order and who performs tasks usually required (and to the extent usually required) of an active member of such order and who is not considered retired because of old age or total disability.

(3) Effective date for election. **(A)** A certificate of election of coverage shall be in effect, for purposes of subsection (b)(8) and for purposes of section 210(a)(8) of the Social Security Act, for the period beginning with whichever of the following may be designated by the order or subdivision thereof:

(i) the first day of the calendar quarter in which the certificate is filed,

(ii) the first day of the calendar quarter succeeding such quarter, or

(iii) the first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the twentieth calendar quarter preceding the quarter in which such certificate is filed.

Whenever a date is designated under clause (iii), the election shall apply to services performed before the quarter in which the certificate is filed only if the member performing such services was a member at the time such services were performed and is living on the first day of the quarter in which such certificate is filed.

(B) If a certificate of election filed pursuant to this subsection is effective for one or more calendar quarters prior to the quarter in which such certificate is filed, then--

(i) for purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for such prior calendar quarters resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed; and

(ii) the statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

(s) Concurrent employment by two or more employers. For purposes of sections 3102, 3111, and 3121(a)(1), if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

[**(t) Repealed.** Pub.L. 100-203, § 9006(b)(2), Dec. 22, 1987, 101 Stat. 1330- 289]

(u) Application of hospital insurance tax to Federal, State, and local employment. (1) Federal employment. For purposes of the taxes imposed by sections 3101(b) and 3111(b), subsection (b) shall be applied without regard to paragraph (5) thereof.

(2) State and local employment. For purposes of the taxes imposed by sections 3101(b) and 3111(b)--

(A) In general. Except as provided in subparagraphs (B) and (C), subsection (b)

shall be applied without regard to paragraph (7) thereof.

(B) Exception for certain services. Service shall not be treated as employment by reason of subparagraph (A) if--

(i) the service is included under an agreement under section 218 of the Social Security Act, or

(ii) the service is performed--

(I) by an individual who is employed by a State or political subdivision thereof to relieve him from unemployment,

(II) in a hospital, home, or other institution by a patient or inmate thereof as an employee of a State or political subdivision thereof or of the District of Columbia,

(III) by an individual, as an employee of a State or political subdivision thereof or of the District of Columbia, serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency,

(IV) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or a medical or dental resident in training,

(V) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before

December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year, or

(VI) by an individual in a position described in section 1402(c)(2)(E).

As used in this subparagraph, the terms "State" and "political subdivision" have the meanings given those terms in section 218(b) of the Social Security Act.

(C) Exception for current employment which continues. Service performed for an employer shall not be treated as employment by reason of subparagraph (A) if--

(i) such service would be excluded from the term "employment" for purposes of this chapter if subparagraph (A) did not apply;

(ii) such service is performed by an individual--

(I) who was performing substantial and regular service for remuneration for that employer before April 1, 1986,

(II) who is a bona fide employee of that employer on March 31, 1986, and

(III) whose employment relationship with that employer was not entered into for purposes of meeting the requirements of this subparagraph; and

(iii) the employment relationship with that employer has not been terminated after March 31, 1986.

(D) Treatment of agencies and instrumentalities. For purposes of subparagraph (C), under regulations--

(i) All agencies and instrumentalities of a

State (as defined in section 218(b) of the Social Security Act) or of the District of Columbia shall be treated as a single employer.

(ii) All agencies and instrumentalities of a political subdivision of a State (as so defined) shall be treated as a single employer and shall not be treated as described in clause (i).

(3) Medicare qualified government employment. For purposes of this chapter, the term "medicare qualified government employment" means service which--

(A) is employment (as defined in subsection (b)) with the application of paragraphs (1) and (2), but

(B) would not be employment (as so defined) without the application of such paragraphs.

(v) Treatment of certain deferred compensation and salary reduction arrangements. (1) Certain employer contributions treated as wages. Nothing in any paragraph of subsection (a) (other than paragraph (1)) shall exclude from the term "wages"--

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not included in gross income by reason of section 402(e)(3), or

(B) any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

(2) Treatment of certain nonqualified deferred compensation plans. (A) In general. Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter as of the later of--

(i) when the services are performed, or

(ii) when there is no substantial risk of forfeiture of the rights to such amount.

The preceding sentence shall not apply to any excess parachute payment (as defined in section 280G(b)) or to any specified stock compensation (as defined in section 4985) on which tax is imposed by section 4985.

(B) Taxed only once. Any amount taken into account as wages by reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter.

(C) Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (a)(5).

(3) Exempt governmental deferred compensation plan. For purposes of subsection (a)(5), the term "exempt governmental deferred compensation plan" means any plan providing for deferral of compensation established and maintained for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing. Such term shall not include--

(A) any plan to which section 83, 402(b), 403(c), 457(a), or 457(f)(1) applies,

(B) any annuity contract described in section 403(b), and

(C) the Thrift Savings Fund (within the meaning of subchapter III of chapter 84 of title 5, United States Code).

(w) Exemption of churches and qualified church-controlled organizations. (1) General rule. Any church or qualified church-controlled organization (as defined in paragraph (3)) may make an election within the time period described in paragraph (2), in accordance with such procedures as the Secretary determines to be appropriate, that services performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act and this chapter. An election may be made under this subsection only if the church or qualified church-controlled organization states that such church or organization is opposed for religious reasons to the payment of the tax imposed under section 3111.

(2) Timing and duration of election. An election under this subsection must be made prior to the first date, more than 90 days after July 18, 1984, on which a quarterly employment tax return for the tax imposed under section 3111 is due, or would be due but for the election, from such church or organization. An election under this subsection shall apply to current and future employees, and shall apply to service performed after December 31, 1983. The election may be revoked by the church or organization under regulations prescribed by the Secretary. The election shall be revoked by the Secretary if such church or organization fails to furnish the

information required under section 6051 to the Secretary for a period of 2 years or more with respect to remuneration paid for such services by such church or organization, and, upon request by the Secretary, fails to furnish all such previously unfurnished information for the period covered by the election. Any revocation under the preceding sentence shall apply retroactively to the beginning of the 2-year period for which the information was not furnished.

(3) Definitions. **(A)** For purposes of this subsection, the term "church" means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.

(B) For purposes of this subsection, the term "qualified church-controlled organization" means any church-controlled tax-exempt organization described in section 501(c)(3), other than an organization which--

(i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and

(ii) normally receives more than 25 percent of its support from either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

(x) Applicable dollar threshold. For purposes of subsection (a)(7)(B), the term "applicable dollar threshold" means $1,000. In the case of calendar years after 1995, the Commissioner of Social Security shall adjust such $1,000 amount at the same time and in the same manner as under section 215(a)(1)(B)(ii) of the Social Security Act with respect to the amounts referred to in section 215(a)(1)(B)(i) of such Act, except that, for purposes of this paragraph, 1993 shall be substituted for the calendar year referred to in section 215(a)(1)(B)(ii)(II) of such Act. If any amount as adjusted under the preceding sentence is not a multiple of $100, such amount shall be rounded to the next lowest multiple of $100.

(y) Service in the employ of international organizations by certain transferred Federal employees. (1) In general. For purposes of this chapter, service performed in the employ of an international organization by an individual pursuant to a transfer of such individual to such international organization pursuant to section 3582 of title 5, United States Code, shall constitute "employment" if--

(A) immediately before such transfer, such individual performed service with a Federal agency which constituted "employment" under subsection (b) for purposes of the taxes imposed by sections 3101(a) and 3111(a), and

(B) such individual would be entitled, upon separation from such international organization and proper application, to reemployment with such Federal agency under such section 3582.

(2) Definitions. For purposes of this subsection--

(A) Federal agency. The term "Federal

agency" means an agency, as defined in section 3581(1) of title 5, United States Code.

(B) International organization. The term "international organization" has the meaning provided such term by section 3581(3) of title 5, United States Code.

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Chapter 23—Federal Unemployment Tax Act

* * * *

§ 3306. Definitions

(a) Employer. For purposes of this chapter--

(1) In general. The term "employer" means, with respect to any calendar year, any person who--

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $1,500 or more, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.

For purposes of this paragraph, there shall not be taken into account any wages paid to, or employment of, an employee performing domestic services referred to in paragraph (3).

(2) Agricultural labor. In the case of agricultural labor, the term "employer" means, with respect to any calendar year, any person who--

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $20,000 or more for agricultural labor, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day.

(3) Domestic service. In the case of domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the term "employer" means, with respect to any calendar year, any person who during any calendar quarter in the calendar year or the preceding calendar year paid wages in cash of $1,000 or more for such service.

(4) Special rule. A person treated as an employer under paragraph (3) shall not be treated as an employer with respect to wages paid for any service other than domestic service referred to in paragraph (3) unless such person is treated as an employer under paragraph (1) or (2) with respect to such other service.

(b) Wages. For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include--

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $7,000 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another

employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to $7,000 to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of--

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall

exclude from the term "wages" only payments which are received under a workmen's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death;

[(3) Repealed. Pub.L. 98-21, Title III, § 324(b)(3)(B), Apr. 20, 1983, 97 Stat. 124]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary--

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or

otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in section 3121(v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(2)(B)(ii)];[,]

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received, or

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof,[;]

(6) the payment by an employer (without deduction from the remuneration of the employee)--

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business;

[**(8)** Repealed. Pub.L. 98-21, Title III, § 324(b)(3)(B), Apr. 20, 1983, 97 Stat. 124]

(9) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(10) any payment or series of payments by an employer to an employee or any of his dependents which is paid--

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(11) remuneration for agricultural labor paid in any medium other than cash;

(12) any contribution, payment, or service, provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans);

(13) any payment made, or benefit furnished,

to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(14) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(15) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(16) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(17) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b);

(18) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d); or

(19) remuneration on account of--

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(c) Employment. For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection

(j)(3)), except--

(1) agricultural labor (as defined in subsection (k)) unless--

(A) such labor is performed for a person who--

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an

individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if--

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is--

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or in the employ of an Indian tribe, or any

instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions or Indian tribes; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than $50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such

employment will not be covered by any program of unemployment insurance, or

(C) service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government--

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to

similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an

international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except--

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);

(18) service described in section 3121(b)(20);

(19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F), (J), (M), or (Q)), and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;

(20) service performed by a full time student (as defined in subsection (q)) in the employ of an organized camp

(A) if such camp--

(i) did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year, or

(ii) had average gross receipts for any 6 months in the preceding calendar year which were not more than 33 1/3 percent of its average gross receipts for the other 6 months in the preceding calendar year; and

(B) if such full time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year; or

(21) service performed by a person committed to a penal institution.

(d) Included and excluded service. For purposes of this chapter, if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (c)(9).

(e) State agency. For purposes of this chapter, the term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(f) Unemployment fund. For purposes of this chapter, the term "unemployment fund" means a special fund, established under a State law and

administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended (42 U.S.C. 1104), shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that--

(1) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;

(2) the amounts specified by section 903(c)(2) or 903(d)(4) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices,

(3) nothing in this subsection shall be construed to prohibit deducting any amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance, or the

withholding of Federal, State, or local individual income tax, if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor;

(4) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act;

(5) amounts may be withdrawn for the payment of short-time compensation under a plan approved by the Secretary of Labor; and

[(6)](5) amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in subsection (t)).

(g) Contributions. For purposes of this chapter, the term "contributions" means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

(h) Compensation. For purposes of this chapter, the term "compensation" means cash benefits payable to individuals with respect to their unemployment.

(i) Employee. For purposes of this chapter, the term "employee" has the meaning assigned to such term by section 3121(d), except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply.

(j) State, United States, and American employer. For purposes of this chapter--

(1) State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) United States. The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(3) American employer. The term "American employer" means a person who is--

(A) an individual who is a resident of the United States,

(B) a partnership, if two-thirds or more of the partners are residents of the United States,

(C) a trust, if all of the trustees are residents of the United States, or

(D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

(k) Agricultural labor. For purposes of this chapter, the term "agricultural labor" has the meaning assigned to such term by subsection (g) of section 3121, except that for purposes of this chapter subparagraph (B) of paragraph (4) of such subsection (g) shall be treated as reading:

"**(B)** in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in subparagraph (A), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;".

[(l) Repealed. Act Sept. 1, 1954, c. 1212, § 4(c), 68 Stat. 1135]

(m) American vessel and aircraft. For purposes of

this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State; and the term "American aircraft" means an aircraft registered under the laws of the United States.

(n) Vessels operated by general agents of United States. Notwithstanding the provisions of subsection (c)(6), service performed by officers and members of the crew of a vessel which would otherwise be included as employment under subsection (c) shall not be excluded by reason of the fact that it is performed on or in connection with an American vessel--

(1) owned by or bareboat chartered to the United States and

(2) whose business is conducted by a general agent of the Secretary of Commerce.

For purposes of this chapter, each such general agent shall be considered a legal entity in his capacity as such general agent, separate and distinct from his identity as a person employing individuals on his own account, and the officers and members of the crew of such an American vessel whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than the United States. Each such general agent who in his capacity as such is an employer within the meaning of subsection (a) shall be subject to all the requirements imposed upon an employer under this chapter with respect to service which

constitutes employment by reason of this subsection.

(o) Special rule in case of certain agricultural workers. (1) Crew leaders who are registered or provide specialized agricultural labor. For purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person shall be treated as an employee of such crew leader--

(A) if--

(i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or

(ii) substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(B) if such individual is not an employee of such other person within the meaning of subsection (i).

(2) Other crew leaders. For purposes of this chapter, in the case of any individual who is furnished by a crew leader to perform agricultural labor for any other person and who is not treated as an employee of such crew leader under paragraph (1)--

(A) such other person and not the crew leader shall be treated as the employer of such individual; and

(B) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual

by the crew leader (either on his behalf or on behalf of such other person) for the agricultural labor performed for such other person.

(3) Crew leader. For purposes of this subsection, the term "crew leader" means an individual who--

(A) furnishes individuals to perform agricultural labor for any other person,

(B) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and

(C) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(p) Concurrent employment by two or more employers. For purposes of sections 3301, 3302, and 3306(b)(1), if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

(q) Full time student. For purposes of subsection (c)(20), an individual shall be treated as a full time student for any period

(1) during which the individual is enrolled as a full time student at an educational institution, or

(2) which is between academic years or terms if--

(A) the individual was enrolled as a full time student at an educational institution for the immediately preceding acade nic year or term, and

(B) there is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in subparagraph (A).

(r) Treatment of certain deferred compensation and salary reduction arrangements. (1) Certain employer contributions treated as wages. Nothing in any paragraph of subsection (b) (other than paragraph (1)) shall exclude from the term "wages"--

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not included in gross income by reason of section 402(e)(3), or

(B) any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

(2) Treatment of certain nonqualified deferred compensation plans. (A) In general. Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter as of the later of--

(i) when the services are performed, or

(ii) when there is no substantial risk of forfeiture of the rights to such amount.

(B) Taxed only once. Any amount taken into account as wages by reason of subparagraph

(A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter.

(C) Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (b)(5).

(s) Tips treated as wages. For purposes of this chapter, the term "wages" includes tips which are

(1) received while performing services which constitute employment, and

(2) included in a written statement furnished to the employer pursuant to section 6053(a).

(t) Self-employment assistance program. For the purposes of this chapter, the term "self-employment assistance program" means a program under which--

(1) individuals who meet the requirements described in paragraph (3) are eligible to receive an allowance in lieu of regular unemployment compensation under the State law for the purpose of assisting such individuals in establishing a business and becoming self-employed;

(2) the allowance payable to individuals pursuant to paragraph (1) is payable in the same amount, at the same interval, on the same terms, and subject to the same conditions, as regular unemployment compensation under the State law, except that-

(A) State requirements relating to availability for work, active search for work, and refusal to accept work are not applicable to such individuals;

(B) State requirements relating to

disqualifying income are not applicable to income earned from self-employment by such individuals; and

(C) such individuals are considered to be unemployed for the purposes of Federal and State laws applicable to unemployment compensation,

as long as such individuals meet the requirements applicable under this subsection;

(3) individuals may receive the allowance described in paragraph (1) if such individuals--

(A) are eligible to receive regular unemployment compensation under the State law, or would be eligible to receive such compensation except for the requirements described in subparagraph (A) or (B) of paragraph (2);

(B) are identified pursuant to a State worker profiling system as individuals likely to exhaust regular unemployment compensation; and

(C) are participating in self-employment assistance activities which--

(i) include entrepreneurial training, business counseling, and technical assistance; and

(ii) are approved by the State agency; and

(D) are actively engaged on a full-time basis in activities (which may include training) relating to the establishment of a business and becoming self-employed;

(4) the aggregate number of individuals receiving the allowance under the program does not at any time exceed 5 percent of the number of individuals receiving regular unemployment compensation under the State law at such time;

(5) the program does not result in any cost to the Unemployment Trust Fund (established by section 904(a) of the Social Security Act) in excess of the cost that would be incurred by such State and charged to such Fund if the State had not participated in such program; and

(6) the program meets such other requirements as the Secretary of Labor determines to be appropriate.

(u) Indian tribe. For purposes of this chapter, the term "Indian tribe" has the meaning given to such term by section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), and includes any subdivision, subsidiary, or business enterprise wholly owned by such an Indian tribe.

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Chapter 24. -- Collection of Income Tax At Source

* * * *

Subchapter A.—Withholding From Wages

§ 3401. Definitions

(a) Wages. For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid--

(1) for active service performed in a month for which such employee is entitled to the benefits of section 112 (relating to certain combat zone compensation of members of the Armed Forces of the United States) to the extent

remuneration for such service is excludable from gross income under such section; or

(2) for agricultural labor (as defined in section 3121(g)) unless the remuneration paid for such labor is wages (as defined in section 3121(a)); or

(3) for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or

(4) for service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if--

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or

(5) for services by a citizen or resident of the United States for a foreign government or an international organization; or

(6) for such services, performed by a nonresident alien individual, as may be designated by regulations prescribed by the Secretary; or

[(7) Repealed. Pub.L. 89-809, Title I, § 103(k),

Nov. 13, 1966, 80 Stat. 1554]

(8)(A) for services for an employer (other than the United States or any agency thereof)--

(i) performed by a citizen of the United States if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii) performed in a foreign country or in a possession of the United States by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country or possession of the United States to withhold income tax upon such remuneration; or

(B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services; or

(C) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within Puerto Rico, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico; or

(D) for services for the United States (or any agency thereof) performed by a citizen of the United States within a possession of the United States to the extent the United States (or such agency) withholds taxes on such remuneration pursuant to an agreement with

such possession; or

(9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(10)(A) for services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or

(B) for services performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back; or

(11) for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

(12) to, or on behalf of, an employee or his beneficiary--

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a); or

(C) for a payment described in section 402(h)(1) and (2) if, at the time of such payment, it is reasonable to believe that the employee will be entitled to an exclusion under such section for payment; or

(D) under an arrangement to which section 408(p) applies; or

(E) under or to an eligible deferred compensation plan which, at the time of such payment, is a plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), or

(13) pursuant to any provision of law other than section 5(c) or 6(l) of the Peace Corps Act, for service performed as a volunteer or volunteer leader within the meaning of such Act; or

(14) in the form of group-term life insurance on the life of an employee; or

(15) to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n)); or

(16)(A) as tips in any medium other than cash;

(B) as cash tips to an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(17) for service described in section 3121(b)(20);

(18) for any payment made, or benefit furnished, to or for the benefit of an employee if

at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) for any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(20) for any medical care reimbursement made to or for the benefit of an employee under a self-insured medical reimbursement plan (within the meaning of section 105(h)(6));

(21) for any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b); or

(22) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

The term "wages" includes any amount includible in gross income of an employee under section 409A and payment of such amount shall be treated as having been made in the taxable year in which the amount is so includible.

(b) Payroll period. For purposes of this chapter, the term "payroll period" means a period for which a payment of wages is ordinarily made to the employee by his employer, and the term "miscellaneous payroll period" means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual, or

annual payroll period.

(c) Employee. For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

(d) Employer. For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that--

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term "employer" (except for purposes of subsection (a)) means such person.

(e) Number of withholding exemptions claimed. For purposes of this chapter, the term "number of withholding exemptions claimed" means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero.

(f) Tips. For purposes of subsection (a), the term "wages" includes tips received by an employee in the

course of his employment. Such wages shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received.

(g) Crew leader rules to apply. Rules similar to the rules of section 3121(o) shall apply for purposes of this chapter.

[(h) Redesignated (g)]

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Chapter 21. -- Crimes, Other Offenses, And Forfeitures

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Subchapter A -- Crimes

§ 7202 Willful failure to collect or pay over tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

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Subchapter D -- Miscellaneous Penalty and Forfeiture Provisions

§ 7343. Definition of term "person"

The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.